Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD ARRINGTON, JR., IN HIS CAPACITY AS MAYOR OF THE CITY OF BIRMINGHAM, *et al*,

Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC., *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Does an ordinance of the City of Birmingham, Alabama violate Title VI of the Civil Rights Act of 1964 or 14th Amendment Equal Protection guarantees by requiring that general contractors bidding on city construction contracts commit to the city, absent a waiver, their agreement to utilize minority subcontractors to the extent of at least 10% of the bid amount, the Birmingham City Council having made express findings in the ordinance that minority firms are virtual nonparticipants in such contracts as a result of historical practices and policies of overt racial discrimination.

2. Can the State of Alabama, through its judicial system, constitutionally apply its competitive bid law statute so as to prohibit the City of Birmingham from adopting such an ordinance directed at remedying the racially discriminatory exclusion of minorities as subcontractors on public contracts let by the City.

PARTIES

Following is a list of all parties to the proceeding in the Supreme Court of Alabama:

RICHARD ARRINGTON, JR., IN HIS CAPACITY AS MAYOR OF THE CITY OF BIRMINGHAM; THE CITY OF BIRMINGHAM; PETE CLIFFORD, DR. E.C. OVERTON, NINA MIGLIONICO, RUSSELL YARBROUGH, DAVID HERRING, JOHN KATOPODIS, JEFF GERMANY, WILLIAM BELL, BESSIE S. ESTELL, AS MEMBERS OF BIRMINGHAM CITY COUNCIL; JOHN DUNCAN, IN HIS CAPACITY AS CITY ENGINEER FOR THE CITY OF BIRMINGHAM,

PETITIONERS
(Appellants below)

vs.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC.; BRASFIELD & GORRIE, INC.; BRICE BUILDING COMPANY, INC.; DORSTER CONSTRUCTION COMPANY, INC.; G. C. COLYER AND COMPANY, INC.; HALLMARK AND BACHUS, INC.; MOORE ENGINEERING & CONSTRUCTION COMPANY, INC.; RICHARDSON CONSTRUCTION COMPANY, INC.; RIVES CONSTRUCTION COMPANY; SOUTHEASTERN PORCELAIN & CONSTRUCTION COMPANY, INC.; SULLIVAN, LONG & HAGERTY, INC.; GUIN COMPANY, INC.; STEVE RUSSO CONTRACTING COMPANY, INC.,

RESPONDENTS
(Appellees below)

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners, the Mayor and city officials of Birmingham, Alabama, pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered in this case.

OPINIONS BELOW

The August 21, 1981 opinion of the Supreme Court of Alabama (not yet officially reported, unofficially reported at 15 Alabama Bar Reports 2300) appears in the Appendix hereto at p. 1. The Order and opinion of the Tenth Judicial Circuit Court entered on December 12, 1977 and that court's Final Judgment and opinion entered on January 13, 1981 appear in the Appendix at p. 45 and p. 22, respectively.

JURISDICTION

This petition for certiorari has been filed within 90 days of August 21, 1981, the date of the entry of the Supreme Court of Alabama's judgment. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

Amendment XIV, Section 1 of the United States Constitution provides:

> "... No state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title VI, Civil Rights Act of 1964, 42 U.S.C. §2000(d) provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Set out in the Appendix hereto are statutes and ordinances as follows:

The minority set aside provisions of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), App. 57.

42 U.S.C. 1981 and 1983, App. 57.

The Alabama Bid Law, Code of Alabama 1975, 41-16-50 (a), App. 58.

Birmingham City Ordinance 77-81, App. 59.

Birmingham City Ordinance 77-257, App. 63.

STATEMENT OF THE CASE

This petition presents the important question of the validity under established principles of federal constitutional and statutory law, of an affirmative action ordinance enacted by the City Council of Birmingham, Alabama providing for a goal of at least 10% participation by minority contractors in construction contracts awarded by the city; the Council, in the ordinance, having found that as a consequence of past overt racial discrimination, minorities were and remained virtually excluded from participation as contractors on city contracts.

Out of a long, overt, oppressive, and notorious history, both in the private and public sectors and firmly grounded in law and customs, of unlawful racial exclusion and discrimination, the City Council of Birmingham began in 1974 to rectify one legacy of that history - the continuing absence of minority business participation in valuable monetary contracts let by the city - by enactment in 1974 of Ordinance 74-2; in 1977, amendatory ordinances 77-81 and 77-257. Ordinance 77-81 and a subsequent 10% minority participation order of the city's mayor issued thereunder were the subject of respondents' initial suit and hearing at the trial level; Ordinance 77-257 was the issue, on respondents' amended complaint, resulting in the trial court's enjoining the ordinance's enforcement and the Alabama Supreme Court's affirmance of that judgment.[1]

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[1] Ordinance 74-2, adopted January 8, 1974, prohibited firms doing business with the city from discriminating on account of race in their employment practices. Ordinance 77-81 (Section 3-3-16, Birmingham City Code, 1980), adopted May 3, 1977, amended 74-2 and, in addition to the employment non-discriminatory provisions contained in Ordinance 74-2, set forth a city policy and purpose of achieving participation by minority business in city contracts let for construction or purchasers. The ordinance provided for pre-bid conferences of intended bidders for the purpose of facilitating minority involvement as subcontractors in the project to be bid. In subsection (i) the ordinance authorized the Mayor to promulgate such rules and regulations as may be deemed necessary "to insure compliance with or to promote the objectives of this section." (App. 62)

A. Proceedings In The Trial Court

The respondents, Associated General Contractors of America, Alabama Branch, commenced this action on November 30, 1977 in the Circuit Court of Jefferson County, Alabama by complaint seeking an order preliminarily enjoining the petitioners (Mayor, members of the Birmingham City Council, and the city Engineer) from enforcing city ordinance 77-81 and the Mayor's 10% regulation issued pursuant to the ordinance. Respondents' complaint alleged that the ordinance and regulation violated rights secured to them by 42 USC 1981, 1983, and 2000(d), 14th Amendment due process and equal protection guarantees, and were otherwise violative of Alabama Bid Law provisions requiring that contracts be awarded on free and open competitive bidding to the lowest responsible bidder.[2] On December 12, 1977 the trial court, after an evidentiary hearing, preliminarily enjoined enforcement of the Mayor's 10%

In early October, 1977, the then Mayor, pursuant to the authority granted in the ordinance, instructed the City Engineer to include in the bid specifications for city contracts a regulation or rule entitled "10 Per Cent Minority Business Utilization Commitment." (App. 48) The regulation had its genesis in the minority set aside provisions of the 1977 Public Works Employment Act of Congress popularly known as the PWE Act, 42 USC 6705(f)(2), the subject of this Court's ruling in *Fullilove* v. *Klutznick,* 100 S.Ct. 2758 (1980). The PWE Act required on PWE funded contracts that the local government unit awarded the federal funds assure the federal government that at least 10% of the contract amount be expended with minority business enterprises (MBE), 42 USC 6705(f)(2). (App. 57) The Mayor's regulation, directed to the general or prime contractors, similarly specified that as part of his contract with the city, the contractor agree to expend at least 10% of the contract with a minority business, unless the contractor was, notwithstanding diligent effort, unable to comply, in which case the city would grant him a waiver of the 10% requirement.

[2] 1975 Code of Alabama, 41-16-50 (App. 58)

minority regulation and denied respondents' application to invalidate the ordinance (App. 56).[3]

The trial court's order specifically found the regulation to be constitutionally unlawful as a classification based on race without a showing of "a legislative finding of the required compelling governmental interest." From its injunctive order, the court saved city contracts funded under the congressional PWE Act of 1977. (App. 54-6)

Following the trial court's ruling of December 12, 1977, City Council adopted Ordinance 77-257 (Section 4-1-51, Birmingham City Code, 1980). The Council in the ordinance, under "Findings and Purpose," found that:

> "(a) Due to historical patterns and practices of racial discrimination, minority business enterprises have not obtained an equitable share of contracts or subcontracts let by the city for construction and for the purchase of goods, materials, equipment or services. Though past official policies of overt discrimination against minorities have now ceased, the existing policies and programs of the city have not effectively eliminated the lingering present effects of this past discrimination. The city has a compelling interest in eradicating the present effects of past discrimination, and in promoting equality of economic opportunity among and between all of its citizens. Because approximately 50 per cent of Birmingham's citizens are racial minority citizens, the economic improvement and advancement of the minority community is vital to the economic

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[3] Ordinance 77-81's effective date was July 1, 1977. The ordinance did *not* set any percentage goal of minority participation and under it virtually none was had until then Mayor David Vann in October 1977 issued the 10% goal order under the ordinance's provisions (R. 662, 847-8, 1175-8, 1197, 1622-4, 494-517) (Per suggestion of this Court's Clerk, record references are to the record before the Alabama Supreme Court; the record to be filed with this Court should this petition be granted).

health of the community as a whole and promotes the general health and welfare of all citizens of the city."[4]

On November 20, 1979, shortly following the election of Richard Arrington, Jr., to succeed David Vann as Mayor of Birmingham, respondents filed an amended complaint seeking to permanently enjoin the new ordinance, their amended complaint putting at issue the validity of Ordinance 77-257 on the same grounds as their original complaint attacking the former ordinance and the MBE 10% specification. The trial court overruled petitioners' motion to stay proceedings pending this Court's decision in *Fullilove* v. *Klutznick, supra,* n. 1. *Fullilove* had then been argued in this Court. This Court rendered its decision on July 2, 1980 upholding the constitutionality of the PWE 10% minority set aside.

On January 13, 1981, the trial court, after a hearing in February, 1980, entered its judgment declaring Ordinance 77-257 invalid and permanently enjoining its enforcement. The court found the ordinance violative of 14th Amendment due process and equal protection and in contravention of 42 USC 1981 and 1983, and further found the ordinance violated state bid law provisions of free and open competitive bidding on public contracts.

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[4] The ordinance then provided that the city's goal was to have MBE participation of at least 15% of the contract amount on construction contracts exceeding $20,000. A general contractor's agreement to expend at least 10% with MBE's was acceptable as evidence of a contractor's good faith effort to meet the goal. The ordinance provided that, on request, a contractor would be relieved of compliance and granted a waiver if (a) no qualified MBE was available; or (b) none was reasonably competitive as to price; or (c) none had given written notice of interest in bidding on the project. (App. 64-5) Following the December 21, 1977 enactment of the ordinance, contracts were let for two years under its provisions and for the first time in Birmingham history MBE participation obtained by the respondent contractors in the overwhelming number of construction contracts let by the City (R. 494-517).

Petitioners forthwith filed notice of appeal to the Supreme Court of Alabama, petitioners' motions for a stay having been denied by both the trial and the state supreme courts.

B. The Alabama Supreme Court's Opinion

The Supreme Court of Alabama affirmed, 3 of the 8 Justices sitting dissenting. The court first found that Ordinance 77-257 violated state bid law provisions in that the MBE requirements were "intrusive specifications wholly unrelated to contract requirements" of suitability or quality and therefore inhibitive of "fair and open competition." (App. 10). The court then found that if the city's ordinance is constitutionally "required," state bid law provisions are legally inconsequential. The court, however, found that the ordinance was not constitutionally required and "even if some affirmative action were required," the "program here imposed is not constitutionally sound" (App 11).[3] The court held that the ordinance violated Title VI of the Civil Rights Act of 1964 (42 USC 2000d) and the Equal Protection Clause of the 14th Amendment on three alternative grounds: (1) the Birmingham City Council lacked competence to address "past constitutional or statutory violations"; (2) the Council did not compile the required record demonstrating the need for the ordinance; and (3) the ordinance "is not carefully

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[3] The court's reasoning that it having found that the ordinance violated state bid law, the ordinance was nevertheless valid if constitutionally "required" but invalid if "merely constitutionally permissive" is, at least in this case, an unreal distinction. The city, an agent of the state, was, by this affirmative action ordinance, performing the constitutionally obligatory function of providing 14th Amendment equal protection to MBE's, i.e., the opportunity, theretofore denied them on account of race, to participate in construction contracts, publicly awarded and publicly funded. In any event, "... this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' " *Sugarman* v. *Dougall,* 413 U.S. 634-644 (1973).

tailored to rectify the continuing effects of past illegal discrimination." (App. 15).[6] The court explicitly found the ordinance constitutionally infirm under its reading of this Court's decisions in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978) and *Fullilove, supra,* n.1. (App. 12). As did the trial court, the Alabama Supreme Court noted that its decision did not affect petitioners' right or obligation to enforce federal statutory or administrative regulations mandating racial preferences. (App. 20)

The three dissenters would have reversed the trial court on the authority of *Fullilove, supra.* n.1 and *Local Union No. 35* v. *City of Hartford,* 625 F. 2d 416 (2nd Cir. 1980), *cert. denied,* 101 S.Ct. 3148 (1981), and upheld the ordinance as "a constitutionally lawful exercise of the City's legislative prerogative." (App. 20-1)

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[6] Neither the trial court nor the state supreme court made a finding, discussed, or at any place made any mention of the uncontradicted and incontrovertible evidence that prior to the issuance of the Mayor's 10% MBE regulation in October, 1977 white general contractors utilized virtually no minority subcontractors on city construction projects; and, that under the regulation and the subsequently enacted ordinance, significant MBE participation was had, infra, n.3. Nor did either of the state courts make any finding or mention of the uncontradicted evidence that prior to the enactment of any of the affirmative action ordinances or the MBE regulation involved in this case, a number of meetings attended by the Mayor and staff, members of City Council, and representatives of minority organizations were called for the purpose of discussing, and at them was discussed, the void of MBE participation and appropriate means of remedying that void (R 1193-7).

REASONS FOR GRANTING THE WRIT

1. A Question Of Great National Importance And Interest Is Presented By The Alabama Supreme Court's Opinion That The Elected City Council Of Birmingham Is Not Competent To, By Ordinance, Identify And Provide Remedial Action For Past And Present Racial Exclusion Of Minorities From Participation In City Construction Contracts.

The court below found, as a matter of law, that the Birmingham City Council was incompetent "to identify and address past constitutional or statutory violations." (App. 16) The court reasoned that (1) The State of Alabama has not authorized the City of Birmingham to "vindicate constitutional or statutory violations" (App. 16),[7] and (2) The City Council is otherwise not among the governmental bodies deemed competent to act in this field, the court citing *Fullilove* v. *Klutznick*, 100 S.Ct. 2758 (1980), and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (App. 16). Neither *Bakke* nor *Fullilove* holds or suggests that the Birmingham City Council was incompetent to enact the ordinance.[8]

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[7] While the court addresses the question of the lack of state legislation enabling the council to enact Ordinance 77-257 and finds that the ordinance violates state bid law, the court is clear to the correct conclusion that if the ordinance comports with constitutional standards it is valid. (App. 11) Petitioners submit that the state grounds advanced by the Alabama Supreme Court are untenable, or, in any event, the federal and state grounds are so interwoven as to render the state grounds a non-independent basis for the judgment below, cf *Staub* v. *City of Baxley, Georgia*, 355 U.S. 313,319 (1958).

[8] As Mr. Justice Brennan suggested in his dissent in *Bakke, supra* at p. 368, it would surely be anomalous to conclude that a state or local government is, under Section 1 of the Fourteenth Amendment, incapable of enacting on its own volition remedial affirmative measures to overcome the present effects of past racial discrimination and, at the same time, recognize that Congress (or a Court) under Section 5 of the Amendment, may compel local governments to do so. E.G., 42 USC 6705 (f)(2), the 10% minority set aside provisions of the Public Works Employment Act of 1977; cf *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979)

Bakke involved a state board of university regents' medical school admissions program of admission preference for a stated number of minorities. This Court held the program constitutionally infirm because the initiating agency had made no finding of racial discrimination in the university's admissions policy, a finding basic and essential to the constitutionality of the remedial program imposed, *Bakke, supra.* p. 307. Birmingham's ordinance expressly found racial discrimination as the root cause of the absence of MBE participation in city construction contracts. On that ground alone, *Bakke* is inapposite. The lower court, nonetheless, elicited from Mr. Justice Powell's judgment language asserted by the state court to facially render the Birmingham City Council incompetent to enact Ordinance 77-257, i.e., "... isolated segments of our vast governmental structure are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria ..." (App. 16)[9] Insofar certainly as concerns the expenditure of public funds for public projects in the city of Birmingham, the city council is no 'islolated segment' of the governmental structure. It *is* the legislative body of the city in which, by state legislative enactment applicable only to Birmingham, broad and plenary powers are vested.[10]

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[9] *Bakke,* p. 309. Similarly, the state court placed great reliance on *Associated General Contractors* v. *San Francisco Unified School District,* 616 F 2d 1381 (9th Cir.1980), *cert. denied* 101 S.Ct.783 (1980) wherein a state *agency's* 25% MBE participation plan was struck down. In that case at p. 1390 the court, however, carefully distinguished between administrative and legislative action, "... affirmative action ... is precisely the kind of policy decision in which legislatures have the greatest advantage in competence over local agencies such as school boards."

[10] "Powers of city - ... except as prohibited by the constitution of this state or restricted by this act, the city shall and may exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever. The enumeration of particular powers by this act shall not be deemed to be exclusive, and in addition to the powers enumerated therein or implied thereby, or appropriate to the exercise of such powers, it is intended that the city shall have and may exercise all powers which, under the constitution of this state, it would be competent for this act specifically to enumerate." Section 2.03, Act 452 of 1955.

Fullilove, supra, held constitutional a Congressionally enacted 10% minority set aside, contained in a floor amendment to the Public Works Employment Act of 1977, 42 U.S.C. 6705 (f)(2). This Court, notwithstanding the absence in the Act of any findings of racial discrimination, upheld the provision as a proper exercise of Congress' constitutional powers. The lower court in this case reasoned, somewhat simplistically, that the Birmingham City Council, not being invested with Congress' Section 5 Fourteenth Amendment power to enforce the Fourteenth Amendment by legislation, was powerless to enact the ordinance here at issue. (App. 16) This Court's emphasis in *Fullilove* on the special competence of Congress to enact the 10% set aside was made in response to the argument that Congress having made no findings in the statute, the provision for a racial preference failed to meet well established constitutional standards. Mr. Justice Powell's concurring opinion, upon which, in part, the Alabama Supreme Court here relied in making its judgment of the Birmingham Council's incompetence to enact the ordinance, carefully differentiated the legislative process from judicial or administrative agency proceedings in regard to the necessity of making specific factual findings. Congress, as a legislative body, is not an adjudicatory body and may consider all relevant facts and opinions including information it acquired in consideration of earlier legislation on the same subject, *Fullilove* v. *Klutznick,* 100 S.Ct., p. 2787.

Surely, the Alabama Supreme Court is correct in pointing out, as often it did, that the Birmingham City Council's powers are not those of Congress, but it remains that the petitioner city council is particularly and, indeed peculiarly, able and authorized to legislate to remedy past racial discrimination, certainly where here, as in contrast with the Congressional statute in Fullilove, the Birmingham Council made express findings of such discrimination in its ordinance (App. 63). The competency of Council to enact Ordinance 77-257 is then, contrary to the lower court's opinion, not compromised but rather buttressed by this Court's judgments in *Bakke* and *Fullilove.* Moreover, the national policy in this area "is clearly one of encouraging state

cooperation and initiative in remedying racial discrimination," *Associated General Contractors of Massachusetts* v. *Altshuler*, 490 F. 2d 9, 15 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974; cf, *New York Gaslight Club* v. *Carey*, 447 U. S. 54 (1980).[11]

To permit the lower court's judgment to stand would be to substantially eviscerate any state and municipal efforts in Alabama and elsewhere to ameliorate "... the effects of past racial discrimination, a national policy objective of the highest priority."[12] Neither the state of Alabama nor any of its counties or cities, excepting Birmingham, has enacted or otherwise established such an affirmative action statute, ordinance, or plan as in Ordinance 77-257. The lower court's ruling serves as a chilling and effective deterrent in Alabama to any future state or local governmental action in this area. Indeed when a group of Alabama paving contractors sued the state of Alabama to enjoin the state's inclusion in its bid specifications for federally funded highway construction the MBE requirements of the United States Department of Transportation, the state filed a third party complaint against DOT praying that DOT be required to grant Alabama funds without the need of the state complying with DOT's MBE regulations, *Central Alabama Paving* v. *James*, 499 F.Supp. 629, 631-2 (MD Ala. 1980).

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[11] In upholding the constitutionality of a state agency's affirmative action plan in *Associated General Contractors of Massachusetts* v. *Altshuler, supra*, the court pointed out that the "discretionary power of public authorities to remedy past discrimination is even broader than that of the judicial branch," 490 F. 2d at 17. In *Local Union No. 35* v. *City of Hartford*, 625 F. 2d 416 (2d Cir. 1980), *cert. denied.*, 101 S.Ct. 3148 (1981), the court sustained against constitutional attack a Hartford city council *ordinance* setting up a minority hiring plan in the building trades, the court saying "In the Ordinance, *a competent and responsible legislative body* ... made findings of past and present discrimination." Id. p. 421 (emphasis added) While the dissent cites the Hartford case, the majority opinion below does not mention the case though often cited and heavily relied upon by petitioners in their brief below.

[12] *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976)

II. The Judgment Below Places The City Of Birmingham In The Irrational And Legally Indefensible Position Of Requiring Affirmative Action On Federally Funded Construction Contracts While, As To City Funded Contracts, Acquiescing In General Contractors' Continued Exclusion Of Minorities As Subcontractors.

The Alabama Supreme Court noted that its decision "does not and cannot foreclose the City's enforcement of federal statutes or constitutionally imposed administrative regulations" calling for affirmative action by the City. (App. 20) The record in this case shows that in April 1977, the federal Department of Housing and Urban Development wrote the City of Birmingham threatening to cut off further grants to the city because the city's Grant Performance report to HUD showed that for the two prior years the city had expended $2.8 million of HUD grants on 117 city awarded contracts with MBE participation totaling $425.[13] From late 1977, following the implementation of Mayor Vann's 10% MBE participation regulation and the subsequent adoption of Ordinance 77-257 on December 21, 1977, through December, 1979, the record shows some $37 million in city construction contracts awarded of which over $5 million went to MBE's.[14] A large share of that $37 million was federal money, but by no means all.

Thus, as to construction contracts paid from city funds derived from local tax revenue, the posture and position of the city government of Birmingham under the lower court's ruling would be this: Under the compulsion of federal law or regulations which condition federal grants of monies to the city for construction projects upon the city's commitment to effect minority participation, the city will demand compliance by general contractors; but, where the construction is funded by

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[13] R.662, Def. Ex. 5; R. 630-59, Def. Ex. 3

[14] R. 494-517

the tax monies of Birmingham citizens, black and white, the city government must award these same general contractors lucrative city contracts notwithstanding the contractors' continuation of their historical practice of engaging only white subcontractors, a practice documented and well known by the governing officials of the city.

If then the lower court ruling stands there remains little doubt of the city's vulnerability to an action by Birmingham minority contractors against the city on Fourteenth Amendment and 42 USC 1983 grounds. See n. 8 *supra;* cf Mr. Justice Blackman's concurring opinion in *United Steelworkers* v. *Weber,* 443 U.S. 193, 99 S.Ct. 2721 at 2731 (1979)

III. The Alabama Supreme Court's Judgment Conflicts With A Recent Decision Of This Court, A Recent Decision Of The Second Circuit Court Of Appeals, And Conflicts With Well Established Principles Of Constitutional Law In The Federal Judiciary Governing Affirmative Action Regulations And Legislation.

A. *Fullilove* v. *Klutznick,* 448 U.S. 448, 100 S.Ct. 2758 (1980)

Birmingham's Ordinance 77-257 more than meets constitutional standards governing affirmative action legislation as this Court defined them in *Fullilove, supra.* As hereinbefore discussed, the Congressionally enacted 10% MBE provision (App. 57), the subject of the general contractors' unsuccessful attack in *Fullilove,* set forth *no* findings of past racial discrimination and the present adverse effects of such discrimination as the constitutional rationale for the statutes' enactment. This Court nevertheless upheld the statute, the Chief Justice saying that although the statute recites no such findings, "... we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," 100 S.Ct. at 2775. In a concurring opinion, Mr. Justice Powell, after stating that the Court had

heretofore never approved race conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations (100 S.Ct. 2784), proceeded with particularity to point out that Congress, a legislative body, need not compile a record or make in the statute factual findings as would be required of a court or administrative agency, 100 S.Ct. 2787.

In the instant case, of course, the city council of Birmingham made precise findings in the ordinance of the continuing effects of past racial discrimination resulting in the present exclusion of minorities from participation in city construction contracts. Given, however, the historically pervasive and notorious racial discrimination in Birmingham, the successful employment discrimination law suits brought in recent years against practically every major local industry and the city itself,[15] and the judicially noticed racial discrimination in the construction and building trades industries throughout this nation,[16] it would be

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[15] *Personnel Board of Jefferson County, Alabama* v. *United States,* 616 F.2d 812 (5th Cir 1980), *cert. denied,* 101 S.Ct. 783 (1980)

Pullman-Standard v. *Swint,* 624 F.2d 525 (5th Cir, 1980), cert. *granted* No. 80-1190 (1981)

Cotton v. *Hinton,* 559 F 2d 1326 (5th Cir 1977)

United States v. *Allegheny-Ludlum Industries,* 546 F 2d 1249 (5th Cir 1977)

James v. *Stockham Valves Co.* 559 F 2d 310 (5th Cir 1977) *cert. denied,* 434 U.S. 1034 (1978)

United States v. *Hayes Internatio Corp.* 456 F. 2d 112 (5th Cir. 1972)

[16] *Fullilove* v. *Klutznick,* 100 S.Ct. 2758 at 2768,2774-5 (1980)

United Steelworkers v. *Weber,* 443 U.S. 193, 99 S.Ct.2721,2725,n.1 (1979)

Local Union No. 35 v. *City of Hartford,* 625 F 2d 416,421-422 (2d Cir. (1980) *cert denied* 101 S.Ct. 3148 (1981)

Associated General Contractors of Massachusetts v. *Altshuler,* 490 F.2d 9, 12 (2d Cir. 1973), *cert.denied* 416 U.S. 957 (1974)

difficult to imagine that the Birmingham City Council, to paraphrase the Chief Justice's above noted comment in *Fullilove,* did not have an abundant historical basis from which it could and did conclude that business as usual with local contractors could serve only to perpetuate the ongoing discrimination against MBE's. Petitioners then submit that the legislative body of the City of Birmingham, abundantly fortified with incontrovertible evidence of minority exclusion from city construction contracts, was, at the least, empowered to enact the remedial measures it did in Ordinance 77-257 even *if* it had made no *findings* of past racial discrimination and the continuing effects of that racial discrimination, *Fullilove,* 100 S.Ct. at 2775,2787. Having made, however, such findings, the City Council's enactment more than comports with this Court's judgment in *Fullilove* and amply satisfied the constitutional safeguards the Court delineated in *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 308-9. Moreover, the Alabama Supreme Court's judgment invalidating the Birmingham ordinance is in conflict with a decision of the Second Circuit Court of Appeals and with established constitutional principles in other circuits governing the validity of affirmative action efforts by state governmental bodies.

B. In *Local Union No. 35* v. *City of Hartford,* 625 F.2d 416 (2d Cir 1980), *cert. denied,* 101 S.Ct. 3148 (1981), the Court of Appeals, in affirming the District Court's approval of a city *ordinance* setting a goal of at least 15% employment of minorities and women on city construction projects, said at p. 421:

> "In the present case the purpose of and need for the Ordinance and Plan were established beyond question. Previous efforts to mitigate or eliminate discrimination in the local building trades had clearly met with failure. [cf Birmingham, infra n. 3]. *In the Ordinance, a competent and responsible legislative body ... made findings of past and present discrimination.*" (emphasis supplied)

The First Circuit Court of Appeals had previously upheld a state plan calling for 20% minority employment in each job category on state construction projects where the evidence of racial discrimination in the Boston area building trades was clear and the contractors, on a showing of unavailability of competent minority workmen, were relieved from compliance,[17] *Associated General Contractors of Massachusetts* v. *Altshuler,* 490 F.2d 9 (1st Cir 1973), *cert. denied,* 416 U.S. 957 (1974).[18]

Should the judgment of the Supreme Court of Alabama be permitted to survive without this Court's consideration of the case on its merits, the result will be to undermine this Court's judgments in *Fullilove* and *Bakke, supra,* and the legion of cases in the Circuit Courts of Appeals recognizing the pervasiveness of racial discrimination in the construction industry and the constitutional validity of affirmative action to ameliorate that discrimination. The lower court's judgment, if left standing, especially serves to cast doubt on, if not impair, the right, within constitutional limitations, of local governing bodies, upon declared legislative findings of historical racial discrimination and the continuing effects thereof, to enact such remedial measures as to reasonably insure that constituent minority business' are thenceforth afforded the opportunity to be participants in public contracts awarded by local governments.

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[17] The same and other protections are afforded contractors in Birmingham Ordinance 77-257, Section 4-1-52(c), App. 64-5; n. 4 *supra*

[18] Also, *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.1971)

Contractors Association of Eastern Pa. v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971).

Southern Illinois Builders Association v. *Ogilive,* 471 F. 2d 680 (7th Cir. 1972)

CONCLUSION

For all of the foregoing reasons, the within petition for a writ of certiorari should be granted.

Respectfully submitted,

James K. Baker
City Attorney of Birmingham
Attorney for Petitioners

APPENDIX

APPENDIX A

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1981

No. 80-261

Richard Arrington, Jr.,
in his capacity of
Mayor of the City of Birmingham, et al.

v.

Associated General Contractors of America,
Alabama Branch, Inc., et al.

Appeal from Jefferson Circuit Court

PER CURIAM.

Plaintiffs sought declaratory and injunctive relief from the operation of City of Birmingham Ordinance 77-257, as amended by Ordinance 79-140. Plaintiffs' suit challenges the amended ordinance as violative of state and federal statutes, as well as state and federal constitutional provisions. Defendants' appeal is from a decree which adjudges the amended ordinance invalid and enjoins its enforcement. We affirm.

HISTORY OF THE CASE

In 1974, the Birmingham City Council adopted Ordinance 74-2, which required assurance of nondiscriminatory employment practices by those contracting with the City of Birmingham. Ordinance 74-2 was amended on May 3, 1977, by Or-

dinance 77-81 to include a requirement that, within thirty days of an award of a city contract, the contracting party provide an analysis of its workforce by race, sex, and national origin. Additionally, the amended ordinance authorized the mayor to "promulgate such additional rules and regulations as he [might] determine to be reasonably necessary to insure compliance with or to promote the objectives of" the amended ordinance.

In October 1977, former Birmingham Mayor David Vann, pursuant to the authority granted in Ordinance 77-81, instructed the city engineer to include in the bid specifications for city contracts a requirement that the general or prime contractor agree to expend at least ten percent of the contract amount with certain minority subcontractors or suppliers. The specification had its genesis in the 1977 Public Works Employment Act, popularly known as the PWEA, 42 U.S.C. § 6701, *et seq.* (Supp. III 1979). The PWEA required that a local government unit awarded PWEA funds assure that at least ten percent of the contract amount would be expended with minority business enterprises.

On November 30, 1977, Associated General Contractors of America, Alabama Branch, Inc., along with several contractors doing business in the Birmingham area, brought suit against Birmingham, its mayor, and other city officials, seeking to have declared invalid Ordinance 77-81 and the mayor's regulation requiring the ten percent minority commitment. Additionally, plaintiffs sought an order preliminarily enjoining defendants' enforcement of the ordinance and the mayor's regulation. Plaintiffs' complaint alleged that the city's ordinance and regulation violated the due process and equal protection guarantees of the federal and state constitutions, federal statutes forbidding discrimination on account of race, and the state competitive bid law. After a hearing, the circuit court entered an order denying plaintiffs' motion to preliminarily enjoin enforcement of ordinance 77-81, but granting plaintiffs' motion to preliminarily enjoin enforcement of the mayor's regulation.

Nine days after the circuit court declared the mayor's regulation void and enjoined its enforcement, the Birmingham City Council adopted Ordinance 77-257. Later, on August 28, 1979, the Council amended the ordinance to change certain bid requirements and to provide further for waiver of the ordinance provisions. Shortly thereafter, following the election of Richard Arrington, Jr., to succeed David Vann as Mayor of Birmingham, plaintiffs sought to permanently enjoin the enforcement of Ordinance 77-257, as amended, by amending their complaint of November 30, 1977, to put at issue the validity of the amended ordinance and to substitute the then appropriate city officials as parties defendant.

The amended complaint charged that the ordinance violated the equal protection and due process guarantees of the state and federal constitutions, as well as 42 U.S.C. §§ 1981 and 1983 (1976 ed.); 42 U.S.C. §§ 2000d to d-4 (1976 ed.); and the Alabama Competitive Bid Law, Code 1975, § 41-16-50 (Supp. 1980). Defendants put at issue each count of plaintiff's complaint, and after a hearing on the merits, the trial court, with findings of fact and conclusions of law, found for plaintiffs and permanently enjoined enforcement of the challenged ordinance. This appeal resulted.

THE CHALLENGED ORDINANCE

Ordinance 77-257, as amended by Ordinance 79-140,[1] commences with a finding that, due to historical patterns and prac-

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[1] Ordinance 77-257, as amended, provides:

> Participation By Minority Business Enterprises in Construction Contracts
>
> Sec. 4-1-51 Findings and purpose.
>
> (a) Due to historical patterns and practices of racial discrimination, minority business enterprises have not obtained an equitable share of contracts or subcontracts let by the city for construction and for the purchase of goods, materials, equipment or services. Though past official policies of overt

tices of racial discrimination, minority business enterprises (MBE) have not obtained an equitable share of contracts or subcontracts let by the City of Birmingham. The ordinance further

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discrimination against minorities have now ceased, the existing policies and programs of the city have not effectively eliminated the lingering present effects of this past discrimination. The city has a compelling interest in eradicating the present effects of past discrimination, and in promoting equality of economic opportunity among and between all of its citizens. Because approximately 50 percent of Birmingham's citizens are racial minority citizens, the economic improvement and advancement of the minority community is vital to the economic health of the community as a whole and promotes the general health and welfare of all citizens of the city.

(b) The purpose of this article is therefore to encourage, facilitate and effect greater participation by minority business enterprises in construction contracts let by the city and boards and agencies thereof. For purposes of this section, "minority business" means any business enterprise, whether individually owned or a partnership, joint venture or corporation, at least 50 percent of which is owned by minority group members, or, in the case of a publicly-owned business, at least 51 percent of the stock is owned by minority group members. "Minority group members" are citizens of the United States who are Blacks, Spanish speaking, Orientals, Indians, Eskimos and Aleuts.

Sec. 4-1-52 Goal of fifteen percent participation established.

(a) It is a goal of the City of Birmingham that at least 15 percent of each construction contract let by the city, the amount of which exceeds $20,000, be expended with bona fide minority business enterprises as contractors and subcontractors or suppliers of goods or services. Each contractor bidding on a city construction contract shall be required to make a good faith effort to achieve such goal. The inclusion with the contractor's bid of a specific plan to expend at least 10 percent of a contract amount with minority business enterprises shall be accepted as sufficient evidence of a good faith effort to meet such goals. Provided, however, that as to such construction contracts $100,000 or more, excepting contracts let for street or sewer improvements, no more than 50 percent of such plan for minority business participation shall be for the supply of goods or materials unless a waiver of this provision is obtained from the city engineer as hereinafter provided in subsection (c) hereof.

finds that official policies of overt discrimination against minorities have ceased, but that existing policies and programs of the City have not eliminated the lingering effects of such past

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(b) Each bidder for such a contract with the City of Birmingham must submit with his bid a listing of each minority business enterprise and the work proposed to be performed or the goods or services proposed to be furnished by each and the price contracted therefor. The bid of any bidder not providing this information shall be considered non-responsive.

(c) At or before the time for filing the statement required by subparagraph (b) above, a written request for a waiver or partial waiver of the goal may be submitted to the city engineer. Each contractor requesting a waiver shall be afforded an opportunity by the city engineer to present evidence supporting his request for such waiver and be furnished a written ruling upon such request within two (2) days (Saturdays and Sundays and city holidays excluded) of the time of receipt of such request. The city engineer may grant a waiver for either of the following reasons:

(1) Lack of qualified minority business enterprises in the Birmingham Standard Metropolitan Statistical Area (SMSA).

(2) Inability to obtain reasonably competitive prices from the available minority business enterprises in the Birmingham Standard Metropolitan Statistical Area (SMSA), based on prevailing prices on the open market as determined by the city engineer. In all cases where a waiver is requested on the basis that the bid of a minority business enterprise is excessive, there shall be submitted to the city engineer at the time of such request a statement signed by the person requesting the waiver listing the names and bid amount of each person or firm bidding on the same portion or part of the contract as bid by such minority business enterprise.

Where no minority business enterprise or its authorized representative gives written notice of a desire and ability to participate as a subcontractor or supplier of goods or services with respect to a specific contract at the pre-bid conference with respect thereto or by 10:00 a.m. of the second day (Saturdays, Sundays, and city holidays excluded) following such pre-bid conference, each contractor submitting a bid shall be entitled to a waiver.

(d)Upon each request for payment under the contract, each contractor must provide to the city engineer in a signed writing

discrimination. As set forth in the ordinance, the purpose of the enactment was to "encourage, facilitate and effect greater participation by minority business enterprises in construction contracts let by the city."

A "minority business" is defined by the ordinance to be any business enterprise in which minority group members hold at least fifty percent ownership or, in the case of a publicly owned business, one in which at least fifty-one percent of the stock is owned by minority group members. "Minority group members," as used in the ordinance, means United States citizens who are Blacks, Spanish speaking, Orientals, Indians, Eskimos, or Aleuts. For all construction contracts let by the City and exceeding the amount of $20,000, the ordinance sets a goal of fifteen percent to be expended with bona fide MBE contractors, subcontractors, or suppliers of goods or services. The ordinance requires that a contractor make a good faith effort to meet the fifteen percent goal. However, the inclusion with the contractor's bid of a specific plan to expend at least ten percent of a contract amount with MBEs is accepted as sufficient evidence of a good faith effort to meet the fifteen percent goal.

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the name or names of minority enterprises participating in the contract, the nature of the work or services such enterprises have performed or provided, and the amounts paid to such enterprises at the time of such request.

(e) Failure to comply with the terms of this article or to utilize (as may be modified by the waiver) minority business enterprises as stated in the bid shall constitute a breach of contract with the City of Birmingham, upon which breach the city shall have the right to cancel the contract, or to withhold from unpaid sums under the contract such amounts as may be necessary to complete the work contracted for with appropriate minority business enterprise participation, should the contractor fail to fully correct such breach within 15 days of written demand for such correction by the city engineer. (Ord. No. 77-257, as amended by Ord. No. 79-140, 8/28/79)

Any bid not accompanied by a list of proposed MBE subcontractors is considered nonresponsive, unless accompanied by a request for a waiver. Under the ordinance provisions, a contractor may be granted a waiver of the MBE participation requirements for the following reasons:

(1) Lack of a qualified MBE in the Birmingham Standard Metropolitan Statistical Area.

(2) Inability to obtain reasonably competitive prices from available MBEs in the Birmingham Standard Metropolitan Statistical Area.

(3) Failure of MBEs to give notice of their desire to participate as subcontractors with respect to a specific contract.

Each time a contractor makes a request for payment under the contract, he must submit a signed writing which lists his participating minority subcontractor, the work they performed and the amounts paid to them. Finally, the ordinance provides that a contractor's noncompliance with ordinance terms constitutes a breach of the contract by the contractor.

FINDINGS OF THE TRIAL COURT

The circuit court found as follows:

> The evidence shows that it is the practice of the Plaintiff contractors not to make an open solicitation of subcontractor bids but to deal and subcontract with firms seeking subcontract work from the contractor or to seek prices from subcontractors with whom the contractor has had experience ... as to quality of work, performance and ability to obtain bonds. Since the implementation of the Ordinance, it has been shown the procedures required by the City have been time consuming at a cost to the contractor but without meaningful interest or participation by potential MBEs, if in fact available.

The Ordinance and City procedure have established the pre-bid conference to be a "hiring hall" to bring prospective contract bidders and qualified MBEs together so that each may become aware of the other's interest in a particular contract to be let and to provide information to all as to generalities of the proposed construction. If no MBE gives written notice of a desire and ability to participate in respect to the contract discussed at the pre-bid conference, all contractors are entitled to an MBE waiver in accordance with the Ordinance.

Notwithstanding this procedure, the evidence has shown that few, if any, MBEs actually attend the pre-bid conferences. This non-attendance, however, has not resulted in the automatic granting of waivers. Instead, the City has required a detailed demonstration by the contractor that a qualified MBE is not available. The Ordinance has been interpreted by the administering city officials to require 10% MBE commitment and participation. This practice has resulted in the Ordinance being a mandatory quota with a waiver provision instead of a goal. A close reading of the interaction of the Ordinance provisions leads to a similar conclusion.

It has further been shown that the affirmative action aspects of the Ordinance and its administration have created MBE brokerage businesses. The sole participation in City contracts of these businesses is to provide a business entity or front as an MBE who receives a subcontract, generally for materials, adds a commission and, thereafter, subcontracts ... the purchase to a bona fide subcontractor or supplier. This practice has been brought to the attention of the administering City officials, but no evidence has been presented that this abuse has been stopped or attempted to be stopped. These MBE commission brokers are a fraud on the legitimate minority businesses and the taxpaying public.

COMPETITIVE BID LAW CLAIMS

Plaintiffs assert that Ordinance 77-257, as amended, conflicts with Code 1975, § 41-16-50 (Supp. 1980), which provides in part:

> § 41-16-50. Contracts for which competitive bidding required; manner of awarding contracts generally; award of contracts to resident bidders; negotiation of contracts; joint contracts.
>
> (a) All expenditure of funds of whatever nature for labor, services or work, or for the purchase or lease of materials, equipment, supplies or other personal property involving $2,000.00 or more, made by or on behalf of ... the governing bodies of the municipalities of the state and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards and other like utility boards and commissions ... hall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder. ...

Code 1975, § 41-16-50(a) (Supp. 1980).

Plaintiffs complain that, contrary to the statutory mandate, the ordinance requirements not only inhibit fair and open competitive bidding, but also may result in the award of a city contract to someone other than the lowest responsible bidder.

This Court has not had occasion to construe § 41-16-50; however, we have interpreted the statute governing competitive bidding on state contracts, *i.e.*, § 41-16-20. Section 41-16-20, like § 41-16-50, requires that the contract be awarded to the lowest responsible bidder in open competitive bidding, *see*, Code 1975, § 41-16-20 (Supp. 1980), and we believe cases construing § 41-16-20 are instructive in the instant case.

In *White* v. *McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971), this Court recognized the state authorities' broad discretion in determining whether a bidder is the lowest responsible bidder. The Court indicated, however, that the authorities' discretion is not unbounded. The Court said:

> [W]e do not mean to imply that this Court or some other court would not have the authority to declare a contract as being void because the "specifications" were written in such a manner that full and fair competition was excluded. It is fair to say that the legislative intent in passing the Competitive Bid Law was to get the best quality equipment at the lowest possible price, and the executive authorities should carry out this intent of the legislature.

287 Ala. at 86, 248 So. 2d at 129.

While bid specificatons are permissible where their purpose is reasonably related to contract requirements or the quality of the product or service in question, we believe that intrusive specifications wholly unrelated to contract requirements or to product suitability or quality unduly inhibit fair and open competition.

Defendant Birmingham contends that the evidence shows the ordinance has never been applied so as to exclude the lowest responsible bidder. The ordinance, however, does not require that the lowest responsible bid be accepted. Indeed, under the ordinance, the lowest bid is not considered at all unless it is accompanied either by a waiver request, or by a list of proposed MBE subcontractors. Additionally, the ordinance deters participation in the bidding process because, as the circuit court found, the ordinance requirements are time consuming and costly to contractors. As a result, we hold that the ordinance frustrates the open competitive bidding process required by Code 1975, § 41-16-50 (Supp. 1980).

Of course, it is of no consequence that the ordinance contravenes the competitive bidding statute if the ordinance provisions are required by the United States Constitution. That is, the dispositive issue is whether Birmingham's affirmative action program is constitutionally *required* or whether the program is merely constitutionally *permissible*. Our study of recent federal decisions convinces us that the program is not constitutionally required, and, furthermore, even if some affirmative action program were required, we believe that the program here imposed is not constitutionally sound.

The case of *Associated General Contractors* v. *San Francisco Unified School District.*, 616 F.2d 1381 (9th Cir.), *cert. denied*, 101 S. Ct. 783 (1980), provides guidance for our resolution of the question. In that case, plaintiffs challenged an affirmative action policy adopted by the San Francisco Board of Education. Under the policy, the school district was required to award twenty-five percent of the dollar volume of certain construction contracts to minorities, either by letting the contract to a minority general contractor, or by requiring the general contractor to utilize the specified percentage of minority subcontractors. The twenty-five percent set-aside applied only to projects funded by PWEA funds, although receipt of PWEA funds was conditioned on a minority participation of only ten percent. The district court held the set-aside illegal, except as to the ten percent minority participation requirement for federally funded projects, and the school board appealed.

The United States Court of Appeals for the Ninth Circuit found the minority participation requirement in conflict with the California Education Code, which requires that a construction contract be awarded to the "lowest responsible bidder." Furthermore, the Court sustained the code provision against constitutional attack on the basis of *Washington* v. *Davis*, 426 U.S. 229 (1976), finding the competitive bid law race-neutral on its face and without discriminatory purpose. Finally, the Court found no constitutional duty to institute "stacked deck" affir-

mative action programs, that is, programs which deny some non-minorities the relevant benefit by imposing a preference for minorities. Since the affirmative action program was not constitutionally compelled, the competitive bid provision of the California Education Code was a constitutional exercise of state power, and the Court of Appeals affirmed the district court's decision by holding that the set-aside policy violated the California Code provision.

We believe the *San Francisco Unified School District* case is in all material respects factually identical to the case at bar. Although in that case the affirmative action program was imposed by an agency having no legislative powers, rather than, as here, by a city council having limited legislative power, a city council has no more authority than an agency to initiate programs in violation of state law or policy. *See, Busch Jewelry Co.* v. *City of Bessemer,* 269 Ala. 180, 112 So. 2d 344 (1959), *City of Mobile* v. *Madison,* 40 Ala. App. 713, 122 So. 2d 540 (1960). Thus, we follow the Ninth Circuit interpretation of relevant case law to conclude that Birmingham Ordinance 77-257, as amended, is invalid because the ordinance contravenes Code 1975, § 41-16-50 (Supp. 1980), without constitutional justification.

FEDERAL CONSTITUTIONAL AND STATUTORY CLAIMS

Even assuming either the nonexistence or the unconstitutionality of the competitive bid law, still Ordinance 77-257 must itself pass constitutional muster before its provisons can stand. We believe that the affirmative action program proposed by the ordinance does not comport with the constitutional requirements announced in *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980), and *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978). Specifically, we hold that the ordinance violates Title VI and the Equal Protection Clause of the 14th Amendment because (1) the Birmingham City Council is not a competent body to identify and address past constitutional or statutory violations; (2) even if the council were a competent

body to identify and address past constitutional or statutory violations, the council has not compiled the necessary record to demonstrate the need for the affirmative action program; and (3) even if the council were a competent body which had compiled the necessary record to demonstrate the need for an affirmative action program, the remedy imposed is not carefully tailored to rectify the continuing effects of past illegal discrimination.

Neither *Fullilove* nor *Bakke* gives this Court an absolute statement as to the equal protection analysis which should be applied in cases which question the constitutionality of affirmative action programs. Nevertheless, we believe that the approach of Justice Powell is fairly representative of a more rigorous standard of review, and for purposes of this opinion we will employ the analytical framework proposed by him.

We are reluctant to belabor the reader by quoting Justice Powell at length; however, we recognize that he most succinctly states his own reasoning and approach in cases involving equal protection challenges to governmentally imposed race preferences. For example, in the *Fullilove* case, Justice Powell wrote:

> The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. ... For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.
>
> . . . .

Racial preference never can constitute a compelling state interest. " 'Distinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving* v. *Virginia,* 388 U.S., at 11, quoting *Hirabayashi* v. *United States,* 320 U.S. 81, 100. Thus, if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103(f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment. ...

The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination. ... The existence of illegal discrimination justifies the imposition of a remedy that will "make persons whole for injuries suffered on accou;nt of unlawful ... discrimination." *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975). A critical inquiry therefore, is whether § 103(f)(2) was enacted as a means of redressing such discrimination. But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. ...

Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. ... Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. ...

> Our past cases also establish that even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose. ...

Fullilove v. *Klutznick,* 448 U.S. at 496-498 (Powell, J., concurring)(citations and footnotes omitted). *See also, Regents of the University of California* v. *Bakke,* 438 U.S. at 287-320.

Thus, when affirmative action programs are challenged, the questions are whether:

(1) The govermental body imposing the plan has the authority and capability to remedy past constitutional or statutory violations;

(2) The body compiled the record necessary to support the conclusion that past illegal conduct existed and that adverse residual effects of the conduct continue to exist; and

(3) The plan imposed is narrowly tailored to address the residual effects of the identified past violations.

Undoubtedly the Ordinance 77-257 set-aside is a racial classification resulting in a discriminatory preference for the named minority groups. Although the ordinance states that the racial preference is a goal, rather than a mandatory quota, nevertheless, a contractor is required to submit, along with his bid, either a specific plan for ten percent MBE participation in the contract, or a request for administrative waiver of the ten percent requirement. The result is that ten percent of city construction work, by dollar amounts, is reserved for minority businesses.

The City's stated purpose for imposing the racial classification was to "encourage, facilitate and effect greater participation by minority business enterprises in construction contracts let by the city." While the City's purpose is meritorious, it is in-

deed a grave measure to accomplish that purpose through discrimination against non-minorities. For this reason, the reallocation of burdens and benefits by the ordinance classification is constitutionally permissible only as the remedial response to specific illegal action against those to be benefited by the classification.

Necessarily, the Birmingham City Council must be invested with some remedial power before it can properly identify and redress past illegal conduct. Defendant Birmingham contends that the City Counsel, having limited police powers, is an entirely appropriate and competent body to find and address constitutional and statutory violations. In this case, we disagree.

Here, we are dealing neither with the broad remedial powers of Congress conferred by the 13th, 14th, and 15th Amendments, *cf., Fullilove* v. *Klutznick,* 448 U.S. at 483; 448 U.S. at 500 (Powell, J., concurring), nor with the limited powers of a court. *Cf., Franks* v. *Bowman Transport Co.,* 424 U.S. 747 (1976). As Justice Powell said, "[I]solated segments of our vast governmental structures are not competent to make ... decisions [as to the propriety of race-conscious remedial action], at least in the absence of legislative mandates and legislatively determined criteria." *Regents of the University of California* v. *Bakke,* 438 U.S. at 309 (footnote omitted). The governmental entity involved here, a municipality, derives all of its power from the state, and no municipality can legislate beyond what the state has either expressly or impliedly authorized. *Colvin* v. *Ward,* 189 Ala. 198, 66 So. 98 (1914). We see nothing in the limited police power granted municipalities by the state to warrant the conclusion that municipalities possess the broad remedial power to vindicate constitutional or statutory violations by employing racially discriminatory preferences, but we are not now called upon to answer that question. Certainly the state has not granted cities the power to initiate legislation in direct contravention of state law and policy favoring open competitive bidding on city contracts.

Even assuming the Birmingham City Council were competent to act, we believe the council failed to compile the necessary record to justify the ordinance. Although the ordinance commences with a declaration that historical practices of racial discrimination have resulted in minorities' receiving an inequitable share of city construction contracts, we interpret the pertinent case law to require more than a conclusory legislative preamble to justify the council's imposition of discriminatory racial classifications.[4] To hold that race-conscious remedies may be imposed without competent and particularized findings of record "would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." *Regents of the University of California* v. *Bakke,* 438 U.S. at 310. If all that is required is some statement of justification, unsupported by studies or hearings of record, then there is no substance to the requirement that the race-conscious remedy be justified by findings of past discrimination.[5]

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[4] The exactitude with which constitutional or statutory violations must be identified may vary with the nature and authority of the governmental body involved. *Fullilove* v. *Klutznick,* 448 U.S. at 515 n. 14 (Powell, J., concurring). *See,* 448 U.S. at 477-8. In view of the limited power conferred upon municipal governments, we believe that, before initiating an affirmative action program such as the one before us, the Birmingham City Council must compile a record to support a finding of past illegal discrimination.

[5] As was said by Justice Powell,

> Race-conscious remedies, popularly referred to as affirmative-action programs, almost invariably affect some innocent persons. ... Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public's perception of fairness. ... It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fairminded people that the [legislative] action is just.

Fullilove v. *Klutznick,* 448 U.S. at 506, n. 8 (Powell, J., concurring).

Defendant Birmingham presented no evidence that the ordinance was the considered response to hearings, reports, debates, or empirical studies. In fact, those persons primarily responsible for implementation and enforcement of the ordinance — the former city engineer, the acting city engineer, and the purchasing agent — all testified that they knew of no studies conducted to determine the need or justification for the ordinance. The record reflects that the ordinance was passed shortly after the circuit court's injunction against enforcement of the mayor's regulation requiring ten percent MBE participation. The council appears to have simply adopted the voided regulation, with some minor substantive changes and post hoc findings of past discrimination. As far as the record shows, Birmingham failed to establish that the findings were anything other than an unsubstantiated conclusion by the council.

Our opinion is not changed by the argument that the council was, by its findings, simply admitting its own past wrongs. The council members cannot speak for past city administrations and officials. Furthermore, even if it were appropriate for the City to admit its own misdeeds, absent sufficient findings, it was inappropriate and unneccesary for the City to acknowledge that discrimination has existed in Birmingham; however, past societal discrimination alone is insufficient justification to support the specific remedy dictated by the ordinance set-aside. *See,* 438 U.S. at 310.

We also conclude that Ordinance 77-257 is not narrowly drawn to advance the purported objective of ameliorating the effects of past discrimination. A glance at the ordinance suffices to establish that it was not drafted to address identified past discrimination. Included as beneficiaries of the ordinance are individuals who are "Blacks, Spanish speaking, Orientals, Indians, Eskimos, and Aleuts." Assuming that the city council had sufficient evidence before it to justify a race-conscious preference for Blacks, nothing in the record supports the con-

clusion that the other named minority groups were entitled to remedial relief. *Cf., Fullilove* v. *Klutznick,* 448 U.S. at 537-9 (Stevens, J., dissenting).

The United States Supreme Court and other courts have considered various factors when deciding whether a race-conscious plan is sufficiently narrow to comport with equal protection guarantees. Factors considered are "(i) the efficacy of alternative remedies ... (ii) the planned duration of the remedy ... (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce ... and (iv) the availability of waiver provisions if the hiring plan could not be met." 448 U.S. at 510-11 (Powell, J., concurring). We believe that, viewed in light of these factors, the ordinance must fall.

We do not rule on the efficacy of non-discriminatory alternatives. At trial the issue was contested, but the trial judge did not rule on the question. Additionally, we do not address the issue of the availability of a waiver of ordinance requirements. The ordinance provisions include a waiver, although the plaintiffs contend the waiver is not applied as set down in the ordinance.

However, using factors considered by other courts, we note several infirmities in the ordinance set-aside plan. The ordinance has no time limit, and presumably the ten percent set-aside will remain in force until repealed. Additionally, there is no evidence of written regulations or guidelines. Implementation and enforcement of the ordinance are left to the discretion of administering officials. Finally, there is no indication in the record that the ten percent MBE set-aside has any relationship to the number of minority contractors available and equipped to do city construction work. Certainly, the ordinance is demonstrably broader than necessary.

Defendant Birmingham argues that *Fullilove* is dispositive of every issue in this case and is absolute authority that the or-

dinance set-aside is constitutional. In *Fullilove,* the Court upheld the ten percent set-aside proposed by the Public Works Employment Act of 1977. Since the Birmingham ordinance is modeled on the federal law, defendant continues, the ordinance is undoubtedly constitutional.

Although *Fullilove* is guidance for our resolution of the issues in this case, the result in *Fullilove* does not dictate our result here. In short, *Fullilove* turned on the Congressional authority to legislate race-conscious remedial measures. The Congressional authority is rooted in the 13th, 14th, and 15th Amendments, and without doubt the City of Birmingham has no coextensive power. Furthermore, the PWEA was limited in duration, and its provisions were implemented through extensive regulations. Although the factual differences between the instant case and *Fullilove* seem few, they are material.

In conclusion, we note that our decision does not and cannot foreclose the City's enforcement of federal statutes or constitutionally imposed administrative regulations. Nor do we conclude that no municipality or state governmental entity may initiate a constitutionally sound affirmative action program. We only decide the case before us.

AFFIRMED.

Torbert, C.J., and Maddox, Faulkner, Almon and Embry, JJ., concur.

Jones, Shores and Beatty, JJ., dissent.

Adams, J., not sitting.

JONES, JUSTICE (dissenting).

I would reverse on the authority of *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980). In my opinion the trial court's reliance upon *Central Alabama Paving, Inc.* v. *James,* 499 F. Supp. 629 (M.D. Ala. 1980), is misplaced. The following observation from *James* distinguishes it from the instant case:

> If the "set-aside" or goals or quotas prescribed in this case by DOT — at least to the extent that they applied to racial minorities — had been enacted by Congress, this Court would feel bound by *Fullilove* and would hold such goals to be consistent with the Constitution.

Fullilove, therefore, constrains me to uphold the constitutional validity of the challenged ordinance, a lawful exercise of the City's legislative prerogative. *See also, Local Union No. 35 v. City of Hartford,* 625 F.2d 416 (2d Cir. 1980), *cert. denied* (No. 80-833; June 29, 1981).

Shores and Beatty, JJ., concur.

APPENDIX B

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

CASE NO. CV 77 506-014 WAT

Associated General Contractors of America,
Alabama Branch, Inc., et al.,
Plaintiffs,

v.

Richard Arrington, Jr., etc., et al.,
Defendants.

FINAL JUDGMENT

This is an action for declaratory judgment and injunctive relief by the Plaintiffs, Associated General Contractors of America, Alabama Branch, Inc. (AGC), Brasfield & Gorrie, Inc. and other contractors and sub-contractors against the Defendants, Richard Arrington, Jr., in his capacity as Mayor of the City of Birmingham, The City of Birmingham, and the individual members of the City Council of the City, together with the City Engineer in his official capacity.

The complaint filed in this action seeks to have declared illegal and unconstitutional Ordinance No. 77-81 of the City of Birmingham and Ordinance No. 77-257 as amended by Ordinance No. 79-140 (hereafter referred to as the Ordinance of the City.)

The origin of the subject and purpose of these Ordinances was the Federal Public Works Employment Act of 1971, 91

Stat. 116-121, Pub. Law No. 95-28 enacted by Congress May 13, 1977 as such Law relates to the requirement therein for the utilization of Minority Business Enterprises (MBE) by persons and businesses contracting with the Federal government in the performance of public works contracts authorized and funded by the Federal Act.

The Ordinances involved here generally relate to minority business requirements assuring non-discriminatory practices by City contractors (Ordinance No. 77-81) and MBE quotas or goals imposed on contractors bidding and contracting with the City of Birmingham on City construction contracts (Ordinance No. 77-257 as amended).

In 1977, the Court considered at length on motion for preliminary injunction, testimony and evidence relating to the validity of Ordinance No. 77-81 and a bid specification of the City requiring inclusion in all City construction contracts let for bid a specification requiring the contractor to agree at the time of his bid to:

> ". . . expend at least 10 per cent of the contract, if awarded, for bona fide minority business enterprises."

At the conclusion of the hearing on preliminary injunction, the Court denied a preliminary injunction as to the enforcement of Ordinance No. 77-81 but granted preliminary relief as to the bid and contract specifications.

Thereafter, the City Council of the City adopted Ordinance No. 77-257 on December 21, 1977 and later amended it with the adoption of Ordinance No. 79-140 on August 28, 1979.

The testimony and evidence submitted by the parties at the hearing on preliminary injunction is deemed a part of the record on submission of this action on the merits now. Rule 65(a), Alabama Rules of Civil Procedure.

The aspects of the Plaintiffs' claims in the original complaint relating to the bid and contract specifications are not longer asserted and, in their stead, the Plaintiffs put in issue by amendment the validity of Ordinance No. 77-257 as amended by Ordinance No. 79-140.

The contractors contend that the Ordinances and their application by the City officials require them to favor some subcontractors and discriminate against others solely on the basis of race; that the Ordinance violates the State Competitive Bid Law applicable to the City; constitutes class legislation outside the scope of lawful policy power; is arbitrary and capricious; violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution; violates 42 U.S.C., §1981 and §1983; violates the equal protection guarantees of the Constitution of the State of Alabama and violates Title VI of the Civil Rights Act of 1964, 42 U.S.C., §2000(d), et seq.

Ordinance No. 77-257 as amended[1] commences with findings and purpose that minority business enterprises have not obtain-

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[1] AN ORDINANCE TO ESTABLISH A GOAL FOR AT LEAST FIFTEEN PER CENTUM OF EACH CITY CONSTRUCTION CONTRACT TO BE EXPENDED WITH BONA FIDE MINORITY BUSINESS ENTERPRISES.

BE IT ORDAINED by the Council of the City of Birmingham as follows:

Section 1. FINDINGS AND PURPOSE. Due to historical patterns and practices of racial discrimination, minority business enterprises have not obtained an equitable share of contracts or subcontracts let by the City of Birmingham for construction and for the purchase of goods, materials, equipment or services. Though past official policies of overt discrimination against minorities have not ceased, the existing policies and programs of the City of Birmingham have not effectively eliminated the lingering present effects of such past discrimination. The City of Birmingham has a compelling interest in eradicating the present effects of past discrimination, and in promoting equality of economic opportunity among and between all of its citizens. Because

ed an equitable share of contracts or subcontracts let by the City for construction and the purchase of goods, materials, equipment or services due to historical patterns and practices of racial discrimination. The Ordinance further finds that past official

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approximately fifty percent (50%) of Birmingham's citizens are racial minority citizens, the economic improvement and advancement of the minority community is vital to the economic health of the community as a whole and promotes the general health and welfare of all citizens of the City.

The purpose of this ordinance is therefore to encourage, facilitate and effect greater participation by minority business enterprises in construction contracts let by the City of Birmingham and boards and agencies thereof. For the purposes of this section, 'minority business' means any business enterprises, whether individually owned, or a partnership, joint venture or corporation, at least fifty percent (50%) of which is owned by minority group members, or, in the case of a publicly-owned business, at least fifty-one percent (51%) of the stock is owned by minority group members. "Minority group members" are citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

Section 2. (a) It is a goal of the City of Birmingham that at least fifteen percent (15%) of each construction contract let by the City, the amount of which exceeds twenty thousand dollars ($20,000.00), be expended with bona fide Minority Business Enterprises as contractors and subcontractors or suppliers of goods or services. Each contractor bidding on a city construction contract shall be required to make a good faith effort to achieve such goal. The inclusion with the contractor's bid of a specific plan to expend at least ten percent (10%) of a contract amount with Minority Business Enterprises shall be accepted as sufficient evidence of a good faith effort to meet such goals. Provided, however, that as to such construction contracts of one hundred thousand dollars ($100,000) or more, excepting contracts let for street or sewer improvements, no more than fifty percent (50%) of such plan for Minority Business participation shall be for the supply of goods or materials unless a waiver of this provision is obtained from the City Engineer as hereinafter provided in subsection (c) hereof.

(b) Each bidder for such a contract with the City of Birmingham must submit with his bid a listing of each minority Business Enterprise and the work proposed to the performed or the goods or services proposed to be furnished by each and the price contracted therefor. The bid of any bidder not providing this information shall be considered non-responsive.

policies of overt discrimination against minorities have not ceased, but that existing policies and programs of the City have not eliminated the lingering effects of such past discrimination. The definition of "minority group members," as set out in the ordinance, encompasses U. S. citizens who are Blacks, Spanish-

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(c) At or before the time for filing the statement required by subparagraph (b) above, a written request for a waiver or partial waiver of the goal may be submitted to the City Engineer. Each contractor requesting a waiver shall be afforded an opportunity by the City Engineer to present evidence supporting his request for such waiver and be furnished a written ruling upon such request within two (2) days (Saturdays and Sundays and City holidays excluded) of the time of receipt of such request. The City Engineer may grant a waiver for either of the following reasons.

1. Lack of qualified Minority Business Enterprises in the Birmingham Standard Metropolitan Statistical Area (SMSA).

2. Inability to obtain reasonably competitive prices from the available Minority Business Enterprises in the Birmingham Standard Metropolitan Statistical Area (SMSA), based on prevailing prices on the open market as determined by the City Engineer. In all cases where a waiver is requested on the basis that the bid of a Minority Business Enterprise is excessive, there shall be submitted to the City Engineer at the time of such request a statement signed by the person requesting the waiver listing the names and bid amount of each person or firm bidding on the same portion or part of the contract as bid by such Minority Business Enterprise.

Where no Minority Business Enterprise or its authorized representative gives written notice of a desire and ability to participate as a subcontractor or supplier of goods or services with respect to a specific contract at the pre-bid conference, each contractor submitting a bid shall be entitled to a waiver.

(d) Upon each request for payment under the contract, each contractor must provide to the City Engineer in a signed writing the name or names of minority enterprises participating in the contract, the nature of the work or services such enterprises have performed or provided, and the amounts paid to such enterprises at the time of such request.

speaking, Orientals, Indians, Eskimos and Aleuts. A "minority business" is said to be one in which minority group members have at least 50% ownership or, in the case of publicly-owned business, 51% of the stock is owned by such persons. For all construction contracts let by the City exceeding the amount of $20,000, the Ordinance sets a goal of 15% be expended with bona fide MBEs as subcontractors or suppliers of goods of services. A good faith effort is called for in meeting this goal; however, the Ordinance establishes that a showing that 10% of the contract amount will be going to such businesses is sufficient evidence of a good faith effort. In the case of contracts of $100,000 or more, which are not for street or sewer improvements, no more than 50% of the participation goal may be met by the supply of goods or materials as opposed to the use of minority contractors, subcontractors or suppliers of services. The City Engineer may, however, grant a waiver.

(e) Failure to comply with the terms of this ordinance or to utilize (as may be modified by the waiver) Minority Business Enterprises as stated in the bid shall constitute a breach of contract with the City of Birmingham, upon which breach the City shall have the right to cancel the contract, or to withhold from unpaid sums under the contract such amounts as may be necessary to complete the work contracted for with appropriate Minority Business Enterprise participation, should the contractor fail to fully correct such breach within fifteen (15) days of written demand for such correction by the City Engineer.

Section 3. This ordinance shall apply to all construction contracts let by or for the City or any Board or Agency of the City expending funds provided by the City.

Section 4. Nothing in this Ordinance repeals or supercedes the provisions of Ordinance No. 77-81 or the actions of any officer or official of the City heretofore taken with respect to the subject matter thereof. This Ordinance shall be cumulative in its effect with respect to all matters herein.

Section 5. This Ordinance shall be effective upon its adoption by the City Council of the City of Birmingham.

The Ordinance provides that any bid shall be considered non-responsive if it fails to contain a list of minority businesses and the part they propose to play in performance of the contract. The Ordinance further provides for a waiver or partial waiver of the goal by the City Engineer under the following circumstances:

(1) Lack of qualified minority businesses (2) Inability to obtain reasonably competitive prices. If no minority business gives notice of a desire to participate in a specific contract as a pre-bid conference, all contractors submitting a bid are entitled to a waiver.

Each time the contractor makes a request for payment, he must submit a list of the participating minority businesses, the work they performed and the amounts paid to such businesses. This information must be included in a signed writing. The Ordinance provides that noncompliance with its terms constitutes a breach of contract. Any such breach must be corrected within 15 days after a written demand is issued by the City Engineer.

The evidence shows that it is the practice of the Plaintiff contractors not to make an open solicitation of subcontractor bids but to deal and subscontract with firms seeking subcontract work from the contractor or to seek prices from subcontractors with whom the contractor has had experience with as to quality of work, performance and ability to obtain bonds. Since the implementation of the Ordinance, it has been shown the procedures required by the City have been time consuming at a cost to the contractor but without meaningful interest or participation by potential MBEs, if in fact available.

The Ordinance and City procedure has established the pre-bid conference to be a "hiring hall" to bring prospective contract bidders and qualified MBEs together so that each may become aware of the others' interest in a particular contract to be let and to provide information to all as to generalities of the proposed construction. If no MBE gives written notice of a desire and

ability to participate in respect to the contract discussed at the pre-bid conference, all contractors are entitled to a MBE waiver in accordance with the Ordinance.

Notwithstanding this procedure, the evidence has shown that few, if any, MBEs actually attend the pre-bid conferences. This non-attendance, however, has not resulted in the automatic granting of waivers. Instead, the City has required a detailed demonstration by the contractor that a qualified MBE is not available. The Ordinance has been interpreted by the administering city officials to require 10% MBE commitment and participation. This practice has resulted in the Ordinance being a mandatory quota with a waiver provision instead of a goal. A close reading of the interaction of the Ordinance provisions leads to a similar conclusion.

It has further been shown that the affirmative action aspects of the Ordinance and its administration have created MBE brokerage businesses. The sole participation in City contracts of these businesses is to provide a business entity or front as a MBE who receive a subcontract, generally for materials, add a commission and, thereafter, subcontract or pass the puchase to a bona fide subcontractor or supplier. This practice has been brought to the attention of the administering City officials, but no evidence has been presented that these abuses have been stopped or attempted to be stopped. These MBE commission brokers are a fraud on the legitimate minority businesses and the taxpaying public.

The evidence has also shown that, notwithstanding the stated "goal" of the City, ". . . that at least 15% of each construction contract let be expended with bona fide MBEs and countractors *and* subcontractors *or* suppliers of goods and services . . .," the City does not interpret as applicable or apply the Ordinance in instances where a minority business is the successful bidder and contractor.

There can be no dispute that the MBE requirements of the Ordinance involved here impose a quota based solely upon race and ethnic status.

CONSTITUTIONAL CLAIMS

The opinions of the Justices of the Supreme Court of the United States in its recent decision in *Fullilove, et al* v. *Klutznick, etc., et al,* No. 78-1007, U.S. Sup. Ct., July 2, 1980, provides in this Court's opinion, the guiding rules of law on the issues involved here. In *Fullilove,* the Supreme Court ruled upon the quesiton whether a provision of the Public Works Employment Act of 1977 (the genesis of Ordinance here) requiring that 10 per cent of all federal funds expended for public works projects be "set aside" for minority business enterprises violated the Equal Protection requirements of the Fifth Amendment to the Federal Constitution. An excellent anaylysis of *Fullilove* has very recently been made by The Honorable Truman Hobbs, U.S. District Judge, in the case of *Central Alabama Paving, Inc., et al* v. *Fob James, etc., et al* v. *Neil Goldschmidt,* C A No. 80-358-N, U.S.D.C., M.D. of Alabama, rendered on October 10, 1980. The *Central Alabama Paving* opinion and order resulted from a preliminary injunction hearing seeking to have the federal court enjoin the state governor, the Alabama Highway Department and others from implementing and enforcing provisions of the State of Alabama Highway Department Minority Business Enterprise Program which required that only bids which had a percentage of the work awarded to MBEs or Women Business Enterprises would be considered in awarding State highway contracts. The State highway program was promulgated pursuant to directives of the federal Department of Transportation. Judge Hobbs' opinion in *Central Alabama Paving,* while not decisive of the result here, has been of great assistance to this Court and would be useful to any person attempting to understand the applicable constitutional guidelines laid down by the U. S. Supreme Court

in this area of the law. The difficulty here is compounded by the circumstance that the MBE set aside has not, to date, been ruled upon with approval by a majority of the U. S. Supreme Court.

In *Fullilove,* a majority of the Supreme Court did not agree upon a majority opinion, but six of the Justices *concurred in the judgment* to uphold the authority of Congress to require a "set aside" for minority businesses under the Public Works Employment Act. This, of course, is a majority holding by the U. S. Supreme Court in the results of the MBE set aside action before it, but not a majority opinion of the Court.

In his *Central Alabama Paving* order, Judge Hobbs analyzed the several opinions of the Justices of the U. S. Supreme Court in *Fullilove* as follows:

> "In *Fullilove,* at least two Justices made it clear that they thought Congress itself was forbidden by the Constitution to accord a preference to citizens because they are 'Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.' The thrust of this opinion of Justice Stewart, joined in by Justice Rehnquist, is that 'under the Constitution the government may never act to the detriment of a person solely because of that person's race.'[3] Their opinion made clear their view that the Constitutional 'rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority.' Accordingly, they expressed their opinion that the MBE set-aside provision was unconstitutional because of its denial of equal protection of the law even though Congress itself had commanded the set aside.

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[3] Justices Stewart and Rehnquist of course recognized that a court may take race into account in devising a remedial decree to undo a violation of a law which prohibited discrimination on the basis of race.

Justice Stevens in a separate opinion expressed his conviction that because racial characteristics so seldom provide a relevant basis for disparate treatment and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for such classification be clearly identified and unquestionably legitimate. He found fatal fault with Congressional action which lumped together Negroes, Spanish-speaking Americans, Orientals, Eskimos and Aleuts without any recitation of the economic, social, geographical or historical criteria for inclusion of the named groups and the exclusion of other groups. He was critical of the Congressional failure to explain why the set aside or goal had been put at the figure denominated in the Act. Predictably, he would find the lumpings in the DOT regulation at least equally without any demonstrable basis.

Justice Stevens expressed his conviction that the amount of the award to persons suffering from past wrongs must bear a rational relationship to the extent of the harm it is intended to cure. He failed to see how past wrongs to Blacks in America could justify special grants to Eskimos or Indians. Again, his words clearly have at least equal import when measured against the challenged DOT regulations: 'Although I do not dispute the validity of the assumption that each of the subclasses identified in the Act has suffered a severe wrong at some time in the past, I cannot accept this slapdash statute as a legitimate method of providing classwide relief.' The set-aside figure in the instant case is based on a formula totally unrelated to a figure required to remedy any past wrong.

Justice Stevens would hold the set aside in the 1977 Act of Congress unconstitutional under the Fifth Amendment because Congress failed 'to demonstrate that its unique statutory preference' based on race or national origin was 'justified by a relevant characteristic that is shared by

members of the preferred class.' In the view of Justice Stevens, it would appear that the challenged DOT regulations are at least as fatally flawed.

Justice Powell wrote a separate opinion in *Fullilove* which stressed the fact that the Court was construing an Act of Congress, and the enforcement clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the unique authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. Again and again, he referred to the scope of Congressional discretion. He stated:

> My view that this set aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set aside always will be an appropriate remedy *or that the selection of a set aside by any other governmental body would be* unconstitutional . . . The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies *may vary with the nature and authority of a governmental body.* (emphasis added)

He concluded his opinion: 'But the issue here turns on the scope of Congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate' the set aside provisions of the Act.

The opinion of Chief Justice Burger in *Fullilove* which was joined in by Justices White and Powell also emphasized that the Court was considering an Act of Congress. The

opinion pointed out that Congress is charged by the Constitution with the duty 'to enforce by appropriate legislation the equal protection guarantees of the Fourteenth Amendment.' Chief Justice Burger in explaining the deference to be accorded the Congressional action under consideration in *Fullilove* stated: 'Here we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and the President.'

Chief Justice Burger's opinion again stated:

> ' . . . in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Constitution with competence and authority to enforce equal protection guarantees.'

He further wrote: 'That the program may press the outer limits of Congressional authority affords no basis for striking it down.'

Chief Justice Burger's opinion also pointed out 'the abundant evidence from which Congress could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuate the effects of prior discrimination.' Counsel for DOT conceded that the only evidence of discrimination as to MBEs was the statistical evidence that women are underrepresented in the highway contracting business.

Finally, Chief Justice Burger's opinion has an eloquent quote from Justice Jackson in his book, *The Struggle for Judicial Supremacy,* 321 (1941):

> After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, or some

> other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence."

Judge Hobbs concluded that,

> "This Court, construing the opinions in *Fullilove* believes that these regulations, which without any Congressional command accord a preference to one group to citizens based upon race and sex, are a denial of the equal protection accorded all Americans under the Constitution."

As this Court perceives the holding in *Fullilove,* the federal MBE requirement was upheld by the Supreme Court principally because it was determined to be within the lawful exercise of Congress in employing its broad powers granted by the Spending Power of the Constitution, U. S. Const., Art. I, §8, Cl. 1 and the Commerce Power, U. S. Const., Art. I, §8, Cl. 3 and did not violate the equal protection component of the Due Process Clause. This was emphasized by the writers of the opinion of the Court in *Fullilove* when they stated,

> "Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."

It has been noted by this Court that the MBE set aside in *Fullilove* was a *limited* remedy. The apparent and most obvious limitation being that the MBE set aside was applicable only to the monies appropriated by Congress by the Public Works

Employment Act. No attempt was made by Congress to enlarge the scope of its remedial requirement to all federal contracts for construction projects.

It was also noted by Judge Hobbs in reference to the opinion of Justice Powell in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978) "the special competence of Congress to make findings with respect to the effects of identified past discrimination" as well as "its discretionary authority to take appropriate remedial measures." *Bakke* involved a preferential quota system for admissions to medical school and to the layman would appear to be instructive upon the issues here. *Bakke,* however, resulted only in a majority judgment of the Supreme Court but not a majority opinion of the Court. As a consequence, its authority over the issues here is minimal and gives aid only be setting forth the individual views of the Justices of the Court.

The most recent case relating to the issues here is *Associated General Contractors of California, et al* v. *San Francisco Unified School District, et al,* 616 F. 2d. 1381 (1980) cert. denied U. S. Supreme Court, December _____ 1981, 80-295. This case is instructive by virtue of the almost identical issues and its being the latest judicial expression on the subject and the result in the U. S. Supreme Court. In the *AGC-School District* case, the AGC challenged the "affirmative action policy" adopted by the School Board requiring that bidders for construction contracts let by the school district be minority general contractors or must utilize minority subcontractors for 25% in dollar volume of the contract work. The District Court held that such a set-aside for minority contractors on public works was illegal, except as to projects funded with federal money given on condition that 10% or more of the money would go to minority contractors. After the District Court judgment, the School Board adopted a second policy, nearly identical with the first requiring a 25% MBE set aside only to projects financed by the Public Works Employment Act funds. The District Court then issued

an order changing the School Board's 25% MBE requirement. The school district appealed.

Included among the issues before the U. S. Court of Appeals for the Ninth Circuit was the authority of the School Board under state law and the constitutionality of the policy.

The state law issue turned upon the authority of the California Education Code and its "lowest responsible bidder" requirements. The Court of Appeals found the MBE requirement of the School Board was not authorized by the education code and in conflict with the bid law portion of it. The Constitutional issue turned upon the holding by the Court of Appeals that there was no constitutional duty to take affirmative action to remedy the effects of past discrimination. In so doing, the Court recognized the constitutionality of valid "reshuffling programs." The appeals court further recognized the encroachment onto Fourteenth Amendment protections of "stacked deck" affirmative action programs about judicial findings by courts of past or present discrimination and judicial remedies imposed for Fourteenth Amendment violations. These reasonings resulted in the Court of Appeals holding that there was no constitutional duty upon the School Board to impose a "stacked deck" affirmative program and affirmed the judgment of the federal district court.

As stated above, the holdings by the federal court in the *AGC-School District* case are informative and instructive in the light of the fact that the U. S. Supreme Court denied certiorari to review these holdings and thus refused to overturn them.

After careful and considered review of the matters and opinions set forth above, the Court concludes that the City MBE Ordinance grants an unlawful preference to one group of citizens solely on account of race and is a denial of the due process and equal protection components granted to all citizens by the Fourteenth Amendment of the Constitution.

In the Ordinance here, the City Council set forth in its findings that, due to historical patterns and practices of racial discrimination, minority business enterprises have not obtained an equitable share of contracts *or subcontracts* let by the City of Birmingham. It may well be appropriate and well founded for the governing body of the City to acknowledge past racial discrimination on the part of past City administrations and officials; but the only evidence presented shows that the contractors themselves have chosen between potential subcontractors and material suppliers based only upon considerations of price, quality of work, ability to be bonded and past performance. The Court recalls no evidence to give substantiation to the finding by the City Council that contractors seeking City contracts have been guilty of racial discrimination in the awarding of their subcontracts for work or materials. The City Council has not been granted the special competence of Congress to make such a finding based solely on their own perceived knowledge and information gleaned in their everyday affairs. Neither has the City Council been granted the broad powers of Congress by the Federal or State Constitution. On the strength only of this unsupported finding by the City Council, Plaintiff subcontractors are denied access to at least 10% of the contract amount of City public works contracts that is required to be *set aside* for minority businesses. On the same basis, Plaintiff contractors are required to contract with some subcontractors and material suppliers for racial considerations rather than for sound business practices.

The City MBE Ordinance is also unlimited in time with respect to its remedial effects for perceived past wrongs. Unlike the MBE set aside ruled upon in *Fullilove,* with its limited scope; i. e., the monies appropriated by the Public Works Act, the MBE Ordinance applies to *all* public works contracts of the City in amounts over $20,000 until such time as the Ordinance is amended or repealed. There has been no justification shown for such a sweepings remedy.

For these reasons, the Court concludes that the City MBE Ordinance is unconstitutional.

42 U.S.C. 1981 AND 1983 CLAIMS

Plaintiffs also contend the City MBE Ordinance violates 42 U.S.C. 1981 and 1983.

§1981 provides that,

> "All persons within the jurisdiction of the United States shall have the same right. . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."

It has been held that §1981 is applicable and gives persons of *all* races a claim for racial discrimination. *McDonald* v. *Santa Fe Trail Transp. Co.*, 96 Sup. Ct. 2574, 427 U.S. 273, 49 L.Ed. 2d 493 (1976).

§1983 provides that,

> "Every person, who, under color of any statute, ordinance . . . , of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Local governments and local officials joined in their official capacities can be sued under §1983 for monetary, declaratory and injunctive relief for violations thereunder. *Monell* v. *New York City Dept. of Social Services*, 98 S. Ct. 2018, 436 U.S. 658, 56 L.Ed. 2d 611 (1978).

It has also been held that organizations and corporations have standing to sue under §1981 to vindicate deprivation of

freedoms which the act was designed to protect. *Chicano Police Officers Assoc.* v. *Stover,* (1975 CANM) 526 Fed. 2d 431, vacated without opinion, 96 S. Ct. 3161, 426 U.S. 944, 49 L.Ed. 2d 1181, on remand (CANM) 552 Fed. 2d 918; *International Woodworkers of America* v. *Georgia-Pacific Corp.,* (1977 CA 8 Ark). 568 Fed. 2d 64. Under §1983 it appears, not without disagreement, that a corporation is a person, at least within the context of actions brought under the Fourteenth Amendment Due Process and Equal Protection Clause. *Philadelphia Newspaper, Inc.* v. *Borough Council,* 381 F. Supp. 288 (E.D. Pa. 1974).

This Court further recognizes that, although the issue has not been authoritatively resolved, the great majority of state courts have held that they have concurrent jurisdiction over §1983 claims. *New York Times, Inc.* v. *Arizona Board of Regents,* 519 P. 2d 169 (Ariz. 1974; *Brown* v. *Pitchess,* 531 P. 2d 772 (Cal. 1975); *Aldinger* v. *Howard,* 427 U.S. 1 (1976) [Footnote 17 of Justice Brennan's dissent]; *Brody* v. *Leamy,* 393 N.Y.S. 2d 243 (S. Ct. N.Y. 1977) [Following Justice Brennan's footnote]; *Terry* v. *Kolski,* 254 N.W. 2d 704 (Wis. 1977).

Based upon these matters, the Court concludes that the Plaintiffs here have standing to assert claims of racial discrimination against the City and the individual Defendants under §1981 and §1983 and that these claims are properly brought in this Court. The Court further concludes that the City MBE Ordinance unlawfully interferes with the right of the Plaintiff contractors to contract with the City and subcontractors and further unlawfully abridges the right of the Plaintiff subcontractors to contract for construction work and materials with contractors who seek and obtain City public works contracts, all for reasons solely on account of race. This, in the Court's opinion, is a clear violation of §1981.

In the adoption of the MBE Ordinance and the enforcement of it, the Defendants are in violation of §1983 insofar as their

acts have and continue to deprive the Plaintiffs of their Fourteenth Amendment rights under the due process and equal protection components thereto.

CIVIL RIGHTS ACT OF 1964 CLAIMS

The Plaintiffs contend that the adoption and application of the City MBE Ordinance violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d) et seq. arguing that Justices Stevens, Burger, Stewart and Rehnquist in *Bakke* were of the opinion that the act (Title VI) was crystal clear in prohibiting the use of race as a basis for excluding anyone from participating in a federally funded program.

Leaving aside the question in this case whether the contracts here involve federally funded programs, the first issue that must be reached is whether a private right of action exists under Title VI. If it does not, this claim is baseless.

The Court does not disagree with the Plaintiffs' argument as to the prohibitions proscribed in Title VI, but would observe that Justice Powell, in announcing the judgment of the Court in *Bakke,* pointed out that the Title VI claims there were not before the Supreme Court, having not been previously argued or decided. 438 U.S. at pg. 283, 284, 98 S. Ct. at pg. 765. The Court further observes, based upon Justice Powell's statements, the Supreme Court has yet to rule upon this question.

Because of the Court's conclusions in other portions of this judgment, a ruling here on whether Title VI affords a private right of action to the Plaintiffs is not only unnecessary, but would be ill advised and meaningless. Title VI is a federal statute. It not only does not give explicit authority for private actions, but it also does not give explicit authority to maintain an action under it in the State courts. For this reason, this Court declines to rule upon this issue and will leave such ruling to the federal judiciary.

STATE CONSTITUTION CLAIMS

Without further extending this opinion, the Court concludes for the reasons previously set forth in the CONSTITUTIONAL CLAIMS section of this opinion, the City MBE Ordinance violates Section 1 of the Constitution of Alabama 1901. The rights protected by this section of the State Constitution are the same rights protected by the equal protection rights under the Federal Constitution. *Peddy* v. *Montomgery,* 345 So. 2d 631 at page 633.

COMPETITIVE BID LAW CLAIMS

The State Competitive Bid Law applicable to the governing bodies of the municipalities of the State requires that all expenditures of funds of whatever nature for labor, services or work, or for the purchase or lease of materials, equipment, supplies or other personal property involving $2,000 or more shall be made under contractual agreements entered into by free and open competitive bidding *to the lowest responsible bidder.* Title 41, §41-16-50, Code of Alabama 1975. It is clear that under the provisions of the City Ordinance and the application of it, a contractor or bidder seeking a City public works contract involving $2,000 or more would not be deemed a responsible bidder if he did not meet the requirements of the MBE Ordinance.

The case of *Carson Cadillac Corporation* v. *City of Birmingham,* 232 Ala. 312, 167 So. 794 was an action brought to compel the City to modify or change its specifications for water pipe couplings claiming that under the specifications only one company could successfully bid. In the opinion denying relief to the bidder, the Court stated,

> "It is well-settled that courts of equity, in the absence of fraud or gross abuse, will not interfere with the exercise of discretion by administrative boards in the determination of the necessity and requirements of public accomplishment, much less control the judgments of such boards in respect

> to matters within the technical field of their duties and powers."

It was further stated in *White* v. *McDonald Ford Tractor Company,* 287 Ala. 77, 248 So. 2d 121, that,

> ". . . State authorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence. *In reaching the decision which we reach in this case, we do not mean to imply that this court or some other court would not have the authority to declare a contract as being void because the 'specifications' were written in such a manner that full and fair competition were excluded. . . . The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law.*" (emphasis added)

Even without considerations of Fourteenth Amendment protections, the MBE Ordinance excludes non-minority subcontractors and suppliers from full and fair competition for business resulting from City public works contracts. The same result could occur to non-minority contractors. The State Competitive Bid Law does not authorize full and fair competition for only part of the City public works contracts but requires mandatorily that all expenditures involving $2,000 or more shall be made under contracts entered into by free and open competitive bidding to the lowest responsible bidder.

The competitive bid law does not permit a specification that was written for the purpose of excluding full and fair competition. *White* v. *McDonald Ford Tractor Company, supra.* The MBE Ordinance is such a specification and thus in violation of the bid law.

CONCLUSION

Upon consideration of such matter, the Court concludes that Ordinance No. 77-257 as amended by Ordinance No. 79-140 of the City of Birmingham is invalid and that a permanent injunction is due to issue enjoining the enforcement of such Ordinance.

JUDGMENT

Based upon the foregoing, it is ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That Ordinance No. 77-257 of the City of Birmingham as amended by Ordinance No. 79-140 is hereby declared to be invalid and void.

2. The Defendants, their agents, servants and employees, or any person acting in participation or concert with them are permanently enjoined from enforcing the provisions of said Ordinance No. 77-257 as amended.

3. The principal and sureties on the security heretofore filed by the Plaintiffs to secure the issuance of the preliminary injunction previously entered are released and discharged in full.

4. The costs of this action are taxed to the Defendant, City of Birmingham.

DONE and ORDERED this 13th day of January 1981.

/s/ William A. Thompson
CIRCUIT JUDGE

CC: T. M. Conway
James K. Baker, City Attorney

APPENDIX C

TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

CASE NO. 77 506-014 WAT

Associated General Contractors of America,
Alabama Branch, Inc., et al.,
Plaintiffs,

v.

David J. Vann, et al.,
Defendants.

ORDER

The Associated General Contractors of America and individual contractors bring this action for declaratory and injunctive relief against the City of Birmingham, its Mayor, Council Members and City Engineer.

The action is before the Court at this time on Plaintiffs' motion for preliminary injunction and was submitted after notice on the verified complaint, testimony and evidence presented in open court and excellent memorandums and arguments of counsel for the respective parties.

The Defendants' motion to dismiss or, alternatively, for summary judgment is hereby denied.

At issue here is the validity of Ordinance No. 77-81 adopted by the City Council May 3, 1977, approved by the Mayor May 13, 1977 and effective July 1, 1977; and an executive order of the Mayor requiring the inclusion in all city construction con-

tracts let for bid a specification requiring the Contractor to agree at the time of his bid to:

> "... expend at least 10 percent of the contract, if awarded, for bona fide minority business enterprises."

This specification was issued by the City Engineer October 3, 1977 on oral instructions of the Mayor. No formal or written executive order was issued.

Ordinance No. 77-81 amended Sec. 2-3.2 of the General Code of the City of Birmingham, 1964, states its purpose and policy as follows:

> "Sec. 2-3.2. (a) The purpose of this section is to encourage, facilitate, and effect greater participation by minority business enterprises in contracts of the City of Birmingham (hereinafter sometimes called the "City") for construction and for the purchase of goods, materials, equipment or services. For the purposes hereof "minority business" means any business enterprise, whether individually owned, or a partnership, joint venture, or corporation, which is wholly or substantially owned or controlled by black persons or members of some other racial or national minority group.
>
> (b) In order to implement and enforce the policy declared in subsection (a) hereof, every written contract of the City for construction or for the purchase of goods, materials, equipment, or services, whether awarded through sealed bid or negotiation, shall contain a certificate stating that the person, firm or corporation performing such construction or furnishing such goods, materials, equipment, or services does not discriminate in employment of its personnel against any person or refuse to continue the employment of any person on account of race, creed, color or national origin, or a certificate containing words of similar import, and that, during the term of said contract such person,

firm or corporation will not so discriminate. The exact form of such certificate shall be prescribed by the Mayor. In addition, such person, firm or corporation performing construction contracts in excess of $5,000.00 or furnishing goods, materials, equipment or services on purchase contracts in excess of $10,000.00 shall file with the City within thirty (30) days after notification of the award of any such contract, a report on a form to be prescribed by the Mayor, which report shall contain an analysis of the work force of the said person, firm or corporation as to race, sex and national origin; provided however, that in lieu of filing said report on the form to be prescribed by the Mayor, such person, firm or corporation may file with the City any similar report required to be filed by such person, firm or corporation with the Equal Employment Opportunity Commission."

Subsection (i) of the ordinance provides:

"(i) The Mayor is authorized to promulgate such additional rules and regulations as he may determine to be reasonably necessary to insure compliance with or promote the objectives of this section."

As previously stated, five months later, on the order and instructions of the Mayor, the City Engineer notified all contractors and suppliers on his lists of businesses involved in bidding for City Contracts that the general specifications of City Contracts had been changed and revised to include Minority Business Enterprises (MBE). This specification provides:

"10 PER CENT MINORITY BUSINESS UTILIZATION COMMITMENT:

The Contractor agrees to expend at least 10 percent of the contract, if awarded, for bona fide minority business enterprises. For purposes of this paragraph the term "minority business enterprise" means a business at least 50

percent of which is owned by minority group members or, in case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For purposes of the preceding sentence "minority group members" are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

No partial or complete waiver of the foregoing requirements shall be granted by the City of Birmingham other than in exceptional circumstances. To justify a waiver it must be shown that every feasible attempt has been made to comply and it must be demonstrated that sufficient relevant qualified minority business enterprises (which can perform subcontracts or furnish supplies beyond those already specified in the contract bid) are unavailable in the market area of the project to enable meeting the 10 percent minority business enterprise goal.

If it appears that less than 10 percent of the contract funds (or whatever lower percentage has been authorized by waiver) will be expended to such enterprises, this contract will be suspended or terminated unless (a) the expenditure shortfall is not the fault of the contractor or (b) the contractor satisfactorily demonstrates it will make up for the shortfall during the balance of the contract period. Any waivers hereunder are subject to the approval of the City of Birmingham.

At the 40% completion point, the contractor must provide information on *actual MBE utilization to the City Engineer.*

A listing of each Minority Business Enterprise (MBE) the contractor plans to use, the work to be performed by the MBE, and the aggregate percentage of his contract which the contractor plans to expend for MBE, *must be submitted with each bid.* Bids not providing this informa-

tion, or showing less than 10% MBE utilization, may be considered non-responsive.

Failure to comply with these terms of this Section or to use (as may be modified by waiver) minority business enterprises as stated in the Contractor's assurance constitutes breach of this contract."

The City Engineer testified that since the adoption of Ordinance No. 77-81 the City has included the 10% MBE specification in one EDA (Economic Development Administration) contract and eleven City contracts. Nine of the City contracts have been let since the issuance of the 10% MBE Specification. The City is presently requiring Contractor agreement of the 10% MBE Specification in all of its construction contracts in the undisclosed future and in the immediate future on December 13, 1977. On this latter date the City's Park and Recreation Board will accept and open bids for construction work at Legion Field valued at approximately $3,000,000.

The Plaintiffs contend that the Ordinance and the MBE order violate the State Competitive Laws applicable to the City, Title 42 USC Sections 1981, 1983 and 2000(d), Section 11-45-9 Code of Alabama 1975 and equal protection guaranties of the 14th Amendment to the United States Constitution and Sections 1, 6 and 22 of the Alabama Constitution. The thrust of these contentions is that (1) the Bid Law will be violated by the City by rejecting the lowest responsible bidder if the MBE Specification is not agreed upon by the Contractor in his bid or if his contract is terminated after it is awarded, (2) that the MBE requirement is an unconstitutional and unlawful racial quota and that (3) the Contractor is subjected to the unlawful penalty of being disqualified to bid on City contracts if he fails to meet the requirements of Ordinance 77-81.

The Defendants contend that (1) Ordinance 77-81 is a valid exercise of the City powers and does not facially violate the Bid Law, nor does its delegation to the Mayor of rule making

authority constitute an unlawful or unconstitutional act, and (2) that the MBE Specification is a constitutional and lawful exercise of his authority. Defendants further contend that (3) the Plaintiffs lack standing, (4) that their injury is speculative and outweighed by the injury to the City and not irreparable, (5) that Plaintiffs have not applied for a waiver from MBE requirement, and that (6) Plaintiffs are guilty of laches.

To be entitled to preliminary relief the Plaintiffs or one or more of them, must satisfy the Court that they have a fair question to raise as to the existence of a right to relief and that interim interference, or a balance of convenience or inconvenience to the one party or the other, is or is not expedient. *Cox* v. *Huntsville Gas Light Co.*, 129 Ala. 496, 29 So.867; *Watts* v. *Vickery, et al*, 333 So. 2d 560, ____ Ala. ____ 1976. The injury to the Plaintiffs must be shown to be imminent and irreparable. *State* v. *Mobile & O.R.Co.*, 228 Ala. 533, 154 So. 91.

As shown above, the policy, provisions and requirements of Ordinance No. 77-81 are to encourage and effect greater participation by minority business enterprises in contracts of the City, negotiated or bid, for goods, materials, services, equipment and construction. The Ordinance requires assurances that suppliers and contractors do not discriminate in their personnel and employment practices on account of race, creed, color or national origin. To insure and obtain compliance the Ordinance requires reporting and certification by the City contractors, and monitoring and reporting by City officials to the Mayor.

It is not contended by the Contractors that these requirements impose upon them any greater or more strict requirements than are imposed upon them by present Federal Constitutional standards and equal opportunity statutes and regulations.

The Ordinance is challenged as the genesis of the MBE order and as providing an impermissible municipal penalty; i. e., loss of Birmingham contracts. (Section 11-45-9 Code of Alabama 1975).

As to the first contention, if the MBE Specification is lawful, this challenge is due to be rejected. The Ordinance itself does not impose the MBE requirement, but only encourages minority participation and provides the machinery for monitoring the results. The authority delegated to the Mayor to promulgate additional rules and regulations reasonably necessary to insure complaince with the objectives of the Ordinance or promote such objectives is inoffensive in itself. This challenge, in the Court's opinion, does not raise a fair question as to the existence to a right to relief.

A more serious question is raised by the Plaintiffs as to the lawfulness of the penalty of forfeiting the opportunity of City contracts by contractors who are found to have acted in a manner intended to thwart the purpose and objectives of the Ordinance. Though appearing to raise a fair question as to the existence of a right to relief, the possibility of the imposition of such penalty is merely speculative and prospective at the present time. This contention does not meet the imminent irreparable injury test.

Therefore, the Court is of the conclusion that the requirements of Ordinance No. 77-81 are not due to be preliminarily enjoined.

The Mayor's order culminating in the 10% Minority Business Enterprise contract specification is patterned after a requirement of the Federal Public Works Employment Act (PWE) of 1977, 91 Stat. 116-121, Pub. Law No. 95-28, enacted by Congress May 13, 1977. This Act is "Round II" of a federal grant program appropriating $4 billion to infuse federal funds into the depressed construction industry. Governmental subdivisions including municipalities are the recipients of grant funds from this act understood by the Court to expire in 1978.

This legislative history of the MBE Specification is significant only as to its origin. The City of Birmingham is the grantee of

PWE Act funds and is required to expend them in the manner set forth in such Act. The Plaintiffs do not challenge the use of the MBE requirement in the contracting for construction utilizing these funds and such is not an issue in this action.

The Mayor's MBE Specification is applicable to all contracts of the City, apparently negotiated or bid.

Plaintiffs are an incorporated contractors' association and twelve businesses engaged in general contracting or subcontracting work. The association represents its members or many of them who have in the past and desire in the future to bid on City construction contracts. The individual Plaintiffs have also bid with the City in the past and desire to do so in the future. Most of the company Plaintiffs are also taxpayers of the City.

The MBE Specification is directed at businesses of the Plaintiffs' class, has affected at least one of them on a past bid and will affect all of them in the future. The Plaintiffs have standing to bring this action.

The MBE Specification requires the bidding contractor to agree to use minority business enterprises for a minimum of 10% of the contract. This must be accomplished by utilizing minority subcontractors or suppliers whether their price is higher or not.

The evidence shows that the contractor receives informal bids or offers from most of his prospective subcontractors three to four hours before the hour of the bid letting, most of them by telephone. The subcontractors are selected by the contractor based upon their price and qualifications, the materialmen by price. The evidence shows that if the subcontractors are qualified, the competing subs will be awarded a contract based upon the lowest price offered. If the subcontractor is not qualified, his offer is rejected regardless of price. These subcontract and material prices are plugged into the contractor's

estimate of his portion of the construction and the total cost plus overhead and profit constitute his bid.

If the contractor does not set forth his 10% MBE utilization his bid will be rejected unless a prior waiver has been obtained from the City. In the event the successful bidder fails to meet the MBE Specification, his contract is subject to termination.

The 10% MBE Specification is admittedly a racial quota. In the words of the Defendants, the City has established a policy that ". . . the City's minority population must now be afforded an initial opportunity to get a piece of the action flowing from the millions of dollars expended in City awarded contracts." To this should be added apparently, regardless of price and solely on account of race.

To contend, as the Defendants do, that the Plaintiffs can show no harm because of the waiver provision is rejected.

If the MBE Specification is unconstitutional or in violation of State law, a person subject to it should not be required to obtain a waiver from its terms from the very persons imposing it. If it is unlawful, it is unlawful in all of its parts. Moreover, by its terms, the waiver provisions have no specified standards and its application appears to be solely in the discretion of the Mayor.

It should be noted further that the waiver provision, under industry practices, is impractical if not impossible to utilize. If the MBE requirement is not met and set forth in the bid, the bid is rejected. However, it appears that the bidding contractor will not know until the morning of the bid whether he has and can set forth the required 10% MBEs. It is very unlikely that a waiver request could be considered and acted on in a matter of hours. If the waiver request is submitted along with the bid, the contractor has no assurances it will be granted even though he is the lowest responsible bidder. Thus it has been shown by the evidence, that the cost incurred by the contractor for several weeks of estimating the job will be for nothing.

The MBE Specification raises serious constitutional questions. It is admittedly racial in motive and discriminates against non-minority contractors and subcontractors. Discrimination which contravenes the Equal Protection Clause of the Fourteenth Amendment violates the due process clause of the Fifth Amendment. *Johnson* v. *Robinson,* 415 U.S. 361, 364 (1974). Classifications based solely on race must be subjected to the most rigid judicial scrutiny. *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967). This scrutiny has been held to require that the government must establish a compelling governmental interest for the classification, which interest is unrelated to race, and show that there are no alternative means to advance the interest which would impose a lesser burden on the group disadvantaged. *Loving* v. *Virginia, supra; Dunn* v. *Blumstein,* 405 U.S. 330, 337 (1972).

There has been no legislative history made available to the Court of Ordinance 77-81 or the MBE Specification that might set forth a legislative finding of the required compelling governmental interest. Even the MBE requirement in the PWE Act was a floor amendment to an act to revitalize and reactivate the distressed construction industry. H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1 (1977).

The purpose and possible effect of the MBE Specification is laudable, but in view of the means to obtain this purpose and effect it is suspect.

Inverse discrimination is the subject of present judicial controversy in the case of *Bakke* v. *Regents of the University of California,* 18 Cal. 3rd 34 (1976), cert. granted, 429 U. S. 1090, argued before the U. S. Supreme Court, October 12, 1977, 46 U.S.L.W. 3249. This Court can only speculate on the results of the Bakke case, but likely its decision will aid the Court here.

The Court has also been cited to seven actions in U. S. District Courts of the nation considering the MBE requirement in the federal PWE Act, *supra.* The Court found the cases of

Associated General Contractors of California, et al v. *Secretary of Commerce, et al, U.S. Dist. Ct. Central Dist. of Calif., No. 77-3738-AAH* (11-2-77), (granting preliminary injunction) and *Constructors Association of Western Pennsylvania* v. *Juanita Krebbs, et al, U.S. Dist. Ct. Western Div. Dist. of Penna, No. 77-1035* (11-13-77) (denying preliminary injunction) most helpful. In fairness it should be noted that five other U. S. District Courts denied either temporary restraining orders or preliminary injunctions.

In consideration of the foregoing, the Court is compelled to conclude the Plaintiffs have raised a fair question as to the existence of a right to relief.

The issue whether the MBE Specification violates the State Bid Law depends, in the Court's opinion, on whether the specification is otherwise lawful. If it is lawful, it must be met as other City specifications must be met and noncompliance is due cause for rejection of the offending bid.

Plaintiffs' injury, as shown by the evidence, if injunctive relief is not issued here, is real and irreparable. The Plaintiff contractors will be required to incur the expense of bid preparation at the risk of having their bids rejected for noncompliance or their contract terminated, if successful. The Plaintiff subcontractors who offer their services at a lower cost run the immeasurable risk of loss of contracts to MBE's who are selected solely on account of race. These factors along with others shown by the evidence amply demonstrate irreparable injury.

Lastly, the Defendants raise the defense of laches. The MBE Specification was issued October 3, 1977. The evidence shows that meetings were sought by the AGC Association and the Mayor, and thereafter conducted between them in an effort to explain the specification (by the Mayor) and modify it (by the Contractors). These took place over a two or three week period. This action was filed November 30, 1977, not more than six weeks after the last meeting. Under the circumstances here, the

Plaintiffs can hardly be found to be dilatory. Moreover, for whatever delay, it has not been shown that such delay has caused injury to the Defendants. The Defendants' defense of laches is denied.

In consideration of the foregoing, it is ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The Plaintiffs' motion to preliminarily enjoin the enforcement of Ordinance Number 77-81 is hereby denied.

2. The Defendants are preliminarily enjoined from enforcing the 10% Minority Business Enterprise Specification issued by the City Engineer on October 3, 1977 applicable to City of Birmingham contracts for construction or purchase of goods, materials, equipment or services. This injunction shall not apply to those contracts funded by grants provided by the Public Works Employment Act of 1977.

3. The injunctive aspects of this order shall become effective upon the Plaintiffs' posting security with the Register of the Court in the amount of $2500.00 as required by Rule 65, A.R.C.P.

DONE and ORDERED this 12th day of December 1977.

/s/ William A. Thompson
CIRCUIT JUDGE

CC: Honorable T. M. Conway
Honorable James K. Baker

APPENDIX D

42 USC 1981, 1983, 2000(d), 6705(f)(2)

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§6705(f)(2)

(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

CODE OF ALABAMA 1975

§41-16-50. Contracts for which competitive bidding required; manner of awarding contracts generally; award of contracts to resident bidders; negotiation of contracts; joint contracts.

(a) All expenditure of funds of whatever nature for labor, services or work, or for the purchase or lease of materials, equipment, supplies or other personal property, involving $2,000.00 or more, made by or on behalf of any state trade school, state junior college, state college or university under the supervision and control of the state board of education, the city and county boards of education, the district boards of education of independent school districts, the county commissions and the governing bodies of the municipalities of the state, and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards and other like utility boards and commissions, except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder; provided that in the event a bid is received for an item of personal property to be purchased or contracted for from a person, firm or corporation deemed to be a responsible bidder, having a place of business within the county, where the awarding authority is the county or an instrumentality thereof, or within the municipality, where the municipality or an instrumentality there is the awarding authority, which such bid is no more than three per cent greater than the bid of the lowest responsible bidder, the awarding authority may award the contract to such resident responsible bidder. In the event only one bidder responds to the invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, providing the negotiated price is lower than the bid price.

ORDINANCE NO. 77-81

Sec. 2-3.2. Participation by minority enterprises in city contracts; implementation and enforcement.

(a) The purpose of this section is to encourage, facilitate and effect greater participation by minority business enterprises in contracts of the city for construction and for the purchase of goods, materials, equipment or services. For the purposes hereof "minority business" means any business enterprise, whether individually owned, or a partnership, joint venture or corporation, which is wholly or substantially owned or controlled by black persons or members of some other racial or national minority group.

(b) In order to implement and enforce the police declared in subsection (a) hereof, every written contract of the city for construction or for the purchase of goods, materials, equipment of services, whether awarded through sealed bid or negotiation, shall contain a certificate stating that the person performing such construction or furnishing such goods, materials, equipment or services does not discriminate in employment of its personnel against any person or refuse to continue the employment of any person on account of race, creed, color or national origin, or words of similar import, and that during the term of such contract, such person will not so discriminate. The exact form of such certificate shall be prescribed by the mayor. In addition, such person performing construction contracts in excess of five thousand dollars or furnishing goods, materials, equipment or services on purchase contracts in excess of ten thousand dollars shall file with the city within thirty days after notification of the award of any such contract, a report on a form to be prescribed by the mayor, which report shall contain an analysis of the work force of the person as to race, sex and national origin; provided, that in lieu of filing the report on the form prescribed by the mayor, such person may file with the city any similar report re-

quired to be filed by such person with the Equal Employment Opportunity Commission.

(c) Every contract let by the city pursuant to the provisions of this section shall contain a requirement that the contractor or vendor will conform to the purposes and provisions of this section and shall also include an agreement by such contractor or vendor to make available to the contract compliance officer of the city during reasonable business hours such records as may be required to provide assurance of compliance with the policy set forth in this section.

(d) Intentional misrepresentation or falsification of any statement of fact in the certificate required in subsection (b) hereof shall be grounds for the mayor to take appropriate legal action to cancel any contract entered into with such person and forbidding thereafter any city officer or agency from entering into any contract with such person.

(e) If any such person acts in a manner manifestly designed and intended to thwart the purposes and objectives of this section, such shall be grounds for the mayor to take appropriate legal action to prohibit the acceptance of any bid by such person and to forbid thereafter any city officer or agency from entering into any contract with such person until such time as such person indicates, by overt action, his compliance with this section.

(f) In all cases where bids are to be invited for construction projects the costs of which will clearly exceed one hundred thousand dollars, the notice of such bids shall include a statement that a conference of intended bidders will be held by the city, notice of which they will receive, prior to the time for the opening of bids for the purposes of (1) ascertaining the intended involvement of minority subcontractors on the project to be bid or, (2) discussing commitments for participation in the project by minority subcontractors or (3) discussing the practicality and advisability of dividing the project into separable segments in

order to make possible the submission of bids on such contracts by qualified minority contractors.

Such conferences shall be attended by the mayor or his designated representative, the city department or agency head or other city officer concerned with the contract to be let and such other person or persons as the mayor shall designate or invite.

(g)(1) The city engineer, the city purchasing agent and such other officials as may from time to time be designated by the mayor shall maintain lists of minority business enterprises, their addresses, names of their managing officials, and types of business they would like to be considered for in the contracting and purchasing activities of the city. Such lists shall be brought up to date annually, eliminating those enterprises no longer engaged in business in the Birmingham area or not requesting a continuation of listing according to a questionnaire mailed to the last address furnished to the city.

(2) It shall be the duty of such officials of the city to notify listed enterprises of purchases and proposed contracts as indicated by the nature of business desired, whenever such notices are given to the general public, and to hold a briefing session to which all enterprises are invited at least once each quarter to brief representatives of such enterprises on current purchasing and contract procedures and plans in order to encourage and assist such enterprises in the submission of qualified bids to participate in contracts and purchases made by the city. Such briefing sessions shall be open to the public, and notice thereof shall be given to all newspapers, radio and television outlets in the city with a request that such be broadly disseminated.

(3) Such officials of the city shall, through their staffs or through contract agents approved from time to time by the mayor, make advisory services relative to city bidding and purchasing practices available to such enterprises and other individuals or small businesses seeking to do business with the city.

(h) The mayor's designated representative, under the mayor's supervision and control, shall assist contractors and city agencies and officers in the performance of requirements contained in this section, report regularly and make recommendations to the mayor on matters of compliance or noncompliance with the provisions of this section, establish and maintain a current listing of minority persons and businesses which provide services and materials customarily sought or purchased by the city and perform such other duties hereunder as shall by the mayor be assigned.

(i) The mayor is authorized to promulgate such additional rules and regulations as he may determine to be reasonably necessary to insure compliance with or to promote the objectives of this section.

(j) This section shall not apply to any emergency purchase or contract where the same is not made pursuant to sealed bids.

(k) The contract compliance officer shall submit, not later than July 1, 1978, and each subsequent July 1 thereafter, a written annual report to the council showing therein (1) the number of minority contractors who have provided services or materials to the city during the prior twelve months, (2) a racial composition of the employee force of all contractors dealing with the city during such twelve months and (3) the value of services or materials provided by minority contractors as compared to the total provided by all contractors. (Ord. No. 74-2, §§ 1 to 5; Ord. No. 77-81.)

ORDINANCE NO. 77-257

Sec. 4-1-51 Findings and purpose.

(a) Due to historical patterns and practices of racial discrimination, minority business enterprises have not obtained an equitable share of contracts or subcontracts let by the city for construction and for the purchase of goods, materials, equipment or services. Though past official policies of overt discrimination against minorities have now ceased, the existing policies and programs of the city have not effectively eliminated the lingering present effects of this past discrimination. The city has a compelling interest in eradicating the present effects of past discrimination, and in promoting equality of economic opportunity among and between all of its citizens. Because approximately 50 percent of Birmingham's citizens are racial minority citizens, the economic improvement and advancement of the minority community is vital to the economic health of the community as a whole and promotes the general health and welfare of all citizens of the city.

(b) The purpose of this article is therefore to encourage, facilitate and effect greater participation by minority business enterprises in construction contracts let by the city and boards and agencies thereof. For purposes of this section, "minority business" means any business enterprise, whether individually owned or a partnership, joint venture or corporation, at least 50 percent of which is owned by minority group members, or, in the case of a publicly-owned business, at least 51 percent of the stock is owned by minority group members. "Minority group members" are citizens of the United States who are Blacks, Spanish speaking, Orientals, Indians, Eskimos and Aleuts. (Ord. No. 77-257, 12/21/77)

Sec. 4-1-52 Goal of fifteen percent participaton established.

(a) It is a goal of the City of Birmingham that at least 15 percent of each construction contract let by the city, the amount of

which exceeds $20,000.00, be expended with bona fide minority business enterprises as contractors and subcontractors or suppliers of goods or services. Each contractor bidding on a city construction contract shall be required to make a good faith effort to achieve such goal. The inclusion with the contractor's bid of a specific plan to expend at least 10 percent of a contract amount with minority business enterprises shall be accepted as sufficient evidence of a good faith effort to meet such goals. Provided, however, that as to such construction contracts, no more than two percent of such plan for minority business participation shall be for the supply of goods or materials unless a waiver of this provision is obtained from the city engineer as hereinafter provided in subsection (c) hereof.

(b) Each bidder for such a contract with the City of Birmingham must submit with his bid a listing of each minority business enterprise and the work proposed to be performed or the goods or services proposed to be furnished by each and the price contracted therefor. The bid of any bidder not providing this information shall be considered non-responsive.

(c) At or before the time for filing the statement required by subparagraph (b) above, a written request for a waiver or partial waiver of the goal may be submitted to the city engineer. Each contractor requesting a waiver shall be afforded an opportunity by the city engineer to present evidence supporting his request for such waiver and be furnished a written ruling upon such request within two (2) days (Saturdays and Sundays and city holidays excluded) of the time of receipt of such request. The city engineer may grant a waiver for either of the following reasons:

(1) Lack of qualified minority business enterprises in the Birmingham Standard Metropolitan Statistical Area (SMSA).

(2) Inability to obtain reasonably competitive prices from the available minority business enterprises in the Birmingham Standard Metropolitan Statistical Area (SMSA), based on prevailing prices on the open market as determined by the city engineer. In

all cases where a waiver is requested on the basis that the bid of a minority business enterprise is excessive, there shall be submitted to the city engineer at the time of such request a statement signed by the person requesting the waiver listing the names and bid amount of each person or firm bidding on the same portion or part of the contract as bid by such minority business enterprise.

Where no minority business enterprise or its authorized representative gives written notice of a desire and ability to participate as a subcontractor or supplier of goods or services with respect to a specific contract at the pre-bid conference with respect thereto or by 10:00 a.m. of the second day (Saturdays, Sundays, and city holidays excluded) following such pre-bid conference, each contractor submitting a bid shall be entitled to a waiver.

(d) Upon each request for payment under the contract, each contractor must provide to the city engineer in a signed writing the name or names of minority enterprises participating in the contract, the nature of the work or services such enterprises have performed or provided, and the amounts paid to such enterprises at the time of such request.

(e) Failure to comply with the terms of this article or to utilize (as may be modified by the waiver) minority business enterprises as stated in the bid shall constitute a breach of contract with the City of Birmingham, upon which breach the city shall have the right to cancel the contract, or to withhold from unpaid sums under the contract such amounts as may be necessary to complete the work contracted for with appropriate minority business enterprise participation, should the contract fail to fully correct such breach within 15 days of written demand for such correction by the city engineer. (Ord. No. 77-257, as amended by Ord. No. 79-140, 8/28/79; Ord. No. 80-249, 11/11/80)

Sec. 4-1-53 Application of article.

(a) This article shall apply to all construction contracts let by or for the city or any board or agency of the city expending funds provided by the city.

(b) Nothing in this article repeals or supersedes the provisions of section 3-3-16 or the actions of any officer or official of the city heretofore taken with respect to the subject matter thereof. This article shall be cumulative in its effect with respect to all matters herein. (Ord. No. 79-140, 8/28/79).

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No. 81-934

In the Supreme Court of the United States

October Term, 1981

RICHARD ARRINGTON, JR., IN HIS CAPACITY AS MAYOR OF THE CITY OF BIRMINGHAM, et al.,
Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the Alabama Supreme Court's affirmance of the trial court's decision that the state competitive bid law was violated by Petitioner's ordinance (which was also held to be unconstitutional) that requires non-minority general contractors obtaining city construction contracts to have agreed to discriminate in favor of certain minority subcontractors until such subcontractors have at least 10% of the available work on such city contracts (or else try to obtain from Petitioners a partial or total exemption from the requirement to discriminate), where the Petitioners have not challenged the constitutionality of the state competitive bid law nor contended that application of the state competitive bid law violated any federal statute?

PARTIES

Following is a list of all parties to the proceeding in the Supreme Court of Alabama:

RICHARD ARRINGTON, JR., IN HIS CAPACITY AS MAYOR OF THE CITY OF BIRMINGHAM; THE CITY OF BIRMINGHAM; PETE CLIFFORD, DR. E.C. OVERTON, NINA MIGLIONICO, RUSSELL YARBROUGH, DAVID HERRING, JOHN KATOPODIS, JEFF GERMANY, WILLIAM BELL, BESSIE S. ESTELL, AS MEMBERS OF BIRMINGHAM CITY COUNCIL; JOHN DUNCAN, IN HIS CAPACITY AS CITY ENGINEER FOR THE CITY OF BIRMINGHAM,

PETITIONERS

(Appellants below)

vs.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC.; BRASFIELD & GORRIE, INC.; BRICE BUILDING COMPANY, INC.; DOSTER CONSTRUCTION COMPANY, INC.; G.C. COLYER AND COMPANY, INC.; HALLMARK AND BACHUS, INC.; MOORE ENGINEERING & CONSTRUCTION COMPANY, INC.; RICHARDSON CONSTRUCTION COMPANY, INC.; RIVES CONSTRUCTION COMPANY; SOUTHEASTERN PORCELAIN & CONSTRUCTION COMPANY, INC.; SULLIVAN, LONG & HAGERTY, INC.; GUIN COMPANY, INC.; STEVE RUSSO CONTRACTING COMPANY, INC.,

RESPONDENTS

(Appellees below)

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No. 81-934

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vs.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

Respondents submit that jurisdiction does not lie to review the decision of the Supreme Court of Alabama; or alternatively, that under Rule 17 of the Supreme Court Rules this Court should exercise its discretion to decline to issue the Writ of Certiorari.

OBJECTION TO JURISDICTION

The Alabama Supreme Court's primary basis for affirming the trial court was that the challenged ordinance violated a state competitive bid statute. Although the Alabama Supreme Court also found the ordinance to violate federal constitutional and statutory provisions, state law formed an independent basis for the Alabama Supreme Court's affirmance of the trial court. Since state law provides an independent and adequate basis for decision, this Court is without jurisdiction to hear argument on the federal questions presented. *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed.2d 965, 96 S.Ct. 2849 (1977), on remand 376 N.E.2d 582, 54 Ohio St.2d 286; *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 13 L.Ed.2d 753, 85 S.Ct. 871 (1965).

That the state supreme court considered and rejected the frivolous argument that Petitioners were required, as opposed to permitted, to promulgate such ordinance, does not undermine the independence of the state law basis for decision. Petitioners cite no authority for the proposition that their particular ordinance was federally required but an April 19, 1977 letter from Housing and Urban Development which, as shown below, simply does not require the Petitioners to take the discriminatory action challenged in this litigation.

Although federal law provided an alternative basis for affirmance of the trial court's decision in favor of respondents (the ordinance being, inter alia, unconstitutional) state law provided an independent and adequate basis for decision. This being so, jurisdiction to review is lacking.

STATEMENT OF THE CASE

Respondents filed suit on November 30, 1977 in the Circuit Court of Jefferson County, Alabama seeking to enjoin a promulgation by the Mayor of the City of Birmingham by which the city required general contractors entering into construction contracts with it to set aside at least 10% of their subcontracts for Blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, and Aleuts. Respondents also challenged the ordinance relied upon by the Mayor of the City of Birmingham as empowering him to promulgate the 10% regulation. On December 12, 1977, after evidentiary hearing, the trial court preliminarily enjoined enforcement of the 10% regulation, but found no fault with the ordinance, which did not itself contain such a provision. [Petitioners' Appendix (hereinafter "App.") C.]

Nine days later, the Birmingham City Council adopted the enjoined provision (with minor modification) as Ordinance 77-257 [which, as subsequently amended, will herein be referred to as "the challenged ordinance"]. [App. p. A-3]. Respondents amended their complaint accordingly, and the case was tried on the merits. [App. p. A-3]. After this hearing, the trial court found for plaintiffs, holding that the challenged ordinance violated the state and federal constitutions, violated 42 U.S.C. Sections 1981 and 1983, violated 42 U.S.C. Section 2000(d), and violated the state competitive bid law. [App. pp. A-3, A-22 through A-44]. The Alabama Supreme Court affirmed, citing primarily the competitive bid law, but also agreeing with the trial court that federal constitutional and statutory provisions were violated by the challenged ordinance. [App. pp. A-1 through A-21].

The trial court based its decision on a number of findings including (1) that the challenged ordinance imposed burdens upon respondents without meaningful interest or participation by potential minority business enterprises ("MBEs"), if in fact available [App. p. A-28]; (2) that the ordinance has been interpreted by administering officials to require a 10% mandatory quota (subject to a waiver) rather than merely establishing a goal [App. p. A-29]; (3) that the ordinance has created MBE brokerage businesses, and although this fact was called to the attention of administering city officials, there has been no evidence of an attempt to stop such practices [App. p. A-29]; (4) that there was no evidence that general contractors had discriminated in awarding subcontracts or that the city had discriminated in awarding general contracts [App. p. A-38]; (5) that there has been no justification shown for the challenged ordinance, which is unlimited in time and in scope; and (6) that the ordinance excluded non-minority subcontractors and suppliers from full and fair competition for business resulting from public works contracts, in contravention of the state competitive bid law. [App. p. A-43].

In affirming the trial court, the Alabama Supreme Court relied primarily on Section 41-16-50 of the Code of Alabama of 1975 (as supplemented, 1980), which is the competitive bid statute applicable to municipalities. [App. pp. A-9, A-10]. In its decision, the Alabama Supreme Court noted that the challenged ordinance was not only *not* required by federal law, but was in fact prohibited by the federal constitution and by federal statute.

Alternatively, the Alabama Supreme Court held that the challenged ordinance violated the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. In finding a constitutional violation, the Alabama Supreme Court noted (1) the incompetency

of the City of Birmingham under state law to promulgate such an ordinance [App. p. A-16]; (2) the fact that those persons primarily responsible for implementation and enforcement of the challenged ordinance all testified that they knew of no studies conducted to determine the need or justification for the ordinance, which was passed shortly [9 days] after the trial court's preliminary injunction issued, with the City adopting the voided regulation with minor changes and post hoc findings of past discrimination unsubstantiated by the record in this case [App. p. A-18]; (3) the fact that the challenged ordinance is not narrowly drawn to address identified past discrimination [App. p. A-18]; (4) the fact that the ordinance has no time limits, no written regulations, no guidelines, and according to the record, no relationship to the number of minority contractors available and equipped to do city construction work. [App. p. A-19].

SUMMARY OF THE ARGUMENT

This Court is without jurisdiction to review the affirmance by the Supreme Court of Alabama of the trial court's decision. The Alabama competitive bid law applicable to municipalities provides an independent and adequate basis for the decision of the Supreme Court of Alabama. The Petitioners' argument or inference that their particular ordinance is federally required is frivolous, and does not undermine the independence of the state law basis for decision.

Alternatively, under Rule 17 of the rules of this Court, this Court should decline to review the decision of the Supreme Court of Alabama which is based primarily and independently on state law, but which in addition correctly finds Petitioners' ordinance to be unconstitutional and violative of federal law.

ARGUMENT

Petitioners argue that the question of whether or not the City Council of Birmingham was competent to pass the challenged ordinance is of national importance. However, the determinative question does not concern the competency of the City Council to act. The question is whether, since the challenged ordinance violates the state competitive bid law, this Court can or should undertake to review the Alabama Supreme Court's decision. Only if federal law *required* Petitioners to enact the challenged ordinance (as opposed, inter alia, to some less discriminatory form of non-quota affirmative action) would this Court have jurisdiction to review.

Petitioners cite no legislative or judicial authority in support of the argument they must make in order to obtain review here. The law simply does not require a municipality to require general contractors to favor minority subcontractors with a racial monopoly effected through a 10% quota for "Blacks, Spanish-speaking persons, Orientals, Indians, Eskimos and Aleuts".

In what must be the only decision raising the issue, *Associated General Contractors v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir.), cert. denied ..... U.S. ....., 101 S.Ct. 783, 66 L.Ed.2d 603 (1980), the Ninth Circuit had no difficulty rejecting the frivolous "racial quota is required" argument. That case concerned a San Francisco Board of Education policy to award 25% of certain construction contracts either to minority general contractors or to general contractors who agreed to use 25% minority subcontractors. The Ninth Circuit found the set-aside to be in conflict with the applicable state competitive bid law. The court then rejected a direct attack on the competitive bid law, not made in this case. Finally, the

court confirmed the obvious, that there is no constitutional duty to institute "stacked deck" affirmative action programs such as the 25% racial set-aside there at issue, or the 10% racial set-aside here at issue. When review of the Ninth Circuit's decision was sought, this Court denied the petition for writ of certiorari.

Finding no statutory or judicial support for their attempt to append a federal question onto the state law that was the primary basis for decision below, Petitioners can only argue that an April 19, 1977 letter from the Department of Housing and Urban Development "requires" Petitioners' ordinance. That letter "requires" only the following [R. 662, Def. Ex. 5]:

CORRECTIVE ACTION REQUIRED

1. City of Birmingham Certification contained on HUD 7015.12, Assurances, will no longer be accepted.
2. As provided in 570.306(b)(i), the City must submit additional information or assurances as part of their 1977 application for CDBG Funding.
3. The additional information or assurances must outline the City's schedule for affirmatively furthering FMC 74-7, Attachment O. For assistance and guidance, some suggested activities are listed below:

   A. Advertise in the minority press in addition to utilizing the Birmingham Post-Herald for the same period.

   B. Develop a working relationship with the minority contractors/businesses.

   C. Develop Affirmative Action utilizing, as minimum, the services of the Small Business

Special Assistant to the Mayor and the Small Business Services and Economic Developers, Inc., Birmingham.

It could not be more obvious that "stacked deck" or quota affirmative action is not required by that letter. For the City to argue as they do in their petition [p. 13] that as a result of the decision herein, they are subjected to inconsistent duties is simply not the case.

Recognizing the weakness of their argument, Petitioners, recklessly state, contrary to the evidence adduced at trial, that general contractors have engaged and do engage only white subcontractors. [Petition, pp. 13-14]. At trial, it was proved that general contractors had never discriminated [see App. p. A-38]; that available MBEs in the construction industry had been utilized by white general contractors; and that in the face of lack of available MBEs, operation under the ordinance resulted in the creation of MBE "brokers" or fronts. [See App. p. A-29].

Petitioners' final argument is that the Alabama courts did not apply *Bakke* and *Fullilove* as Petitioners feel they should in holding the ordinance unconstitutional. The argument, however unconvincing, is completely irrelevant. The decision below is not reviewable on this basis, since the decision rests soundly on state law.

However, the ordinance is also clearly unconstitutional. The ordinance bestows a monopoly on businesses owned by Blacks, Spanish-speaking persons, Indians, Orientals, Eskimos and Aleuts. No subcontractor owned or controlled by members of any of these groups was shown to have been the victim of racial discrimination. [App. p. A-38]. Nor did the evidence at trial support the Petitioners' hasty "finding", promulgated nine days after the Mayor's regu-

lation was preliminarily enjoined, of past city discrimination against minority contractors. [App. pp. A-18, A-19].

No studies preceded enactment of the ordinance. [App. p. A-18]. No guidelines ever accompanied the ordinance, nor any means to ensure that only victims of discrimination (if any) would benefit from the racial monopoly. [App. p. A-19]. To the contrary, the trial court found that minority front organizations or "brokers" had benefited under the ordinance, although Petitioners, knowing of such abuse, took no action to stop the practice. [App. p. A-29].

The challenged ordinance is not limited in scope or in time, as was the Congressionally imposed PWEA 10% requirement at issue in *Fullilove*. [App. p. A-19]. Further, as noted in *Fullilove*, Congress has special competence in such matters not shared by the multitude of local governments in this country. [App. p. A-16]. For these and other reasons set forth in the Alabama Supreme Court and trial court opinions, the challenged ordinance shares nothing in a constitutional sense with the Congressional enactment at issue in *Fullilove;* and the decision of the Supreme Court quite correctly applies *Fullilove* and *Bakke* to the evidence adduced at the trial of this case.

CONCLUSION

Since Alabama law provides an independent and adequate basis for decision, this Court is without jurisdiction to review the Alabama Supreme Court's affirmance of the trial court. Petitioners' argument below, justifiably restrained in this Court, to the effect that federal law *requires* such an ordinance, is absurd, and insufficient to undermine the fact that their violation of state competitive bid law is an independent and adequate basis for decision.

Alternatively, under Rule 17 of the rules of this Court, review is inappropriate. A review of the trial and appellate decisions below establishes that the evidence the challenged ordinance did not come close to meeting the strict requirements imposed in *Fullilove* and *Bakke* for validating governmental racial discrimination.

For these reasons, the petition should be denied.

Respectfully submitted,

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